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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 888

UNITED BISCUIT COMPANY OF AMERICA, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

United Biscuit Company of America ("United") petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit entered in this case on August 9, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra,* pp. 1a-14a) is officially reported at 350 F. 2d 615. The opinions and order of the Federal Trade Commission (R. 42, 110, 112)[1] and the initial decisions of

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[1] "R" refers to the printed record in the Court of Appeals.

the hearing examiner (R. 29, 52) are not yet officially reported. They are set out in Appendix B, *infra*, pp. 16a-69a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 9, 1965 (App. A, *infra*, p. 15a). On October 25, 1965, Mr. Justice Clark entered an order extending the time for filing a petition for a writ of certiorari to and including December 13, 1965. On December 7, Mr. Justice Clark entered an order granting a further extension to and including January 7, 1966. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In a proceeding under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, the Commission found that volume discounts given by United in the sale of crackers and cookies to its retail grocery customers might substantially lessen or injure competition among those customers. The Commission's determination was based on the proposition that the requisite injury to competition may be automatically inferred whenever a difference in price is charged to competing customers in a competitive industry. On the basis of this determination, the Commission issued an order in the sweeping language of the statute, prohibiting United from granting any form of price differences to competing customers.

On review, the Court of Appeals rejected this automatic inference test of the Commission but affirmed the Commission's order on the basis of the court's own new interpretation of *F.T.C.* v. *Morton Salt Co.*,

334 U.S. 37 (1948), as holding that the effect on competition of the discount schedule on a single product in a grocery store is to be judged by considering what would be the effect if the same discount were extended to all other products handled by the grocery store, since "an incipient harm . . . could grow into reality if extended to all the items handled by the grocer."

The following questions are presented:

1. Whether the Court of Appeals erred in holding that although price differentials on a seller's product are by themselves relatively insignificant, the competitive injury required under Section 2(a) may be established by considering what would be the effect on competition if the same discounts were extended to cover all other products handled by the seller's retail grocery customers, where there was neither evidence nor findings by the Commission on that point, and where the Commission itself did not base its order on that theory.

2. Whether, under this Court's decision in *F.T.C.* v. *Henry Broch & Co.*, 368 U.S. 360 (1962), the Court of Appeals erred in failing to require that the cease and desist order issued by the Commission be limited to the type of pricing practice adjudicated in this proceeding.

3. Whether the Court of Appeals erred in failing to set aside as an abuse of discretion the Commission's refusal to stay the cease and desist order in this case until United's two larger competitors, who are granting volume discounts similar to those granted by United, have been brought into compliance with outstanding cease and desist orders against them prohibiting their use of such volume discounts.

STATUTE INVOLVED

Section 2(a) of the Clayton Act, as amended (49 Stat. 1527; 15 U.S.C. § 13(a)), in pertinent part provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . .

STATEMENT

This petition seeks review of a judgment of the Court of Appeals for the Seventh Circuit affirming an order of the Federal Trade Commission which in effect directs petitioner, United, to cease and desist from violating Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

The essential facts are undisputed. United is engaged in the manufacture and sale of cookies and crackers, referred to collectively as "biscuit products." (R. 56) The Commission's complaint charged United with a violation of Section 2(a) of the Act by

discriminating in price in sales to its retail grocery customers, thereby causing an actual or probable substantial injury to competition among these customers. (R. 5) The price discrimination charged consisted of the use of graduated volume discounts, uniformly applied, which ranged from 0 per cent through several brackets to a maximum of 6 per cent. (R. 7)[2] The discount percentage was based upon the individual customer's monthly dollar purchases from United, so that if a customer owned more than one outlet, the appropriate discount bracket was determined on the basis of the combined purchases of all of that customer's outlets. (R. 8)

During the year 1959, the period involved in the proceeding, United used two different volume discount schedules. (R. 7) The first schedule, in effect through June 30, 1959, was as follows:

Monthly Purchases	Discounts
$ 00.00 to $ 24.99	0%
25.00 to 39.99	2%
40.00 to 69.99	3%
70.00 to 99.99	4%
100.00 to 124.99	5%
125.00 and over	6%

[2] The proceeding before the Commission related specifically to discount schedules employed during the year 1959 by one of United's then 8 geographical divisions—then known as the Sawyer Division—which covered a seven-state region in the middle west. (R. 56-58)

For the balance of 1959, the following revised schedule was in effect:

Monthly Purchases	Discounts
$ 00.00 to $ 24.99	0%
25.00 to 44.99	1½%
45.00 to 59.99	2%
60.00 to 74.99	2½%
75.00 to 89.99	3%
90.00 to 109.99	3½%
110.00 to 129.99	4%
130.00 to 149.99	5%
150.00 and over	6%

The Commission's case with respect to the operation and anticompetitive effect of United's discount practices was based on evidence of the purchases made and discounts received during two separate three-month periods in 1959 by thirteen independent stores and six chain store outlets located in three cities. (App. A, *infra*, pp. 2a-3a) The Commission called owners of all but one of the thirteen independent stores as witnesses before the hearing examiner. The purchases and discounts of the stores were not in dispute.

The evidence established that most of the major chains received the maximum 6 per cent discount, but that some of the independents also received the 6 per cent. For example, in Gary, Indiana, as shown in the tabulation appearing in the opinion of the Court of Appeals (App. A, *infra*, pp. 3a-4a, n. 2), the retail outlets of the two chain stores each received 6 per cent, while two of the four independents also received 6 per cent during various months.[3]

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[3] Overall figures for the entire 7 state operation of the Sawyer Division show a similar pattern. Thus, for January, 1959, of 21,773 retail grocery customers, 3,718 received a 2% discount,

More importantly, the undisputed evidence also showed that if those independents who received less than the maximum 6 per cent discount had in fact received it, the additional amounts received by each would have been so small that, taking Gary again as an example, the amount would be from 70 cents to $2.65 a month. (App. A, *infra*, pp. 3a-4a, n 2)

At the close of the Commission's case, the hearing examiner, on United's motion, filed an initial decision dismissing the complaint for failure of the Commission to prove either actual or probable injury to competition. The examiner, upon his review of all the evidence, concluded:

> There are many complex factors which enter into the ability of the independent grocery store operator to compete successfully with the corporate chains and with the members of the buying groups. A few dollars per annum difference in the cost of respondent's biscuit products is a relatively remote and unimportant factor. Moreover, the hearing examiner received the distinct impression from the testimony of the store owners that, except for one or two, their businesses are growing and their annual sales are increasing. If, therefore, these independent owners were produced as examples of businessmen who had been competitively injured by respondent's discount schedules, they failed to prove such injury or the possibility thereof. (R. 34)

In reaching his conclusion, the examiner relied in part on the testimony of the independent store witnesses (called as witnesses by the Commission) who expressly

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2,287 3%, 704 4%, 310 5%, and 1,038 6%. The latter group included 42 major chains, but it also included 856 independents. 13,716 customers, who purchased less than $25.00 in that month, received no discounts. (R. 114, 389-92)

answered as to the effect of United's discounts on customer-level competition. He noted that, with only one exception, these witnesses stated that their businesses would not be affected in any substantial degree by United's discounts. (R. 35)

On appeal the Commission reversed the hearing examiner on the ground that the examiner had "erred in failing to apply the proper test to make this determination [of injury to competition]" (R. 47), and, in remanding the proceeding to the examiner, stated that the evidence, if unrebutted, was sufficient to show injury to competition. (R. 50) Ostensibly basing its decision on this Court's opinion in *F.T.C.* v. *Morton Salt Co.*, 334 U.S. 37 (1948), the Commission held that the requisite competitive injury at the customer level "may be inferred from a showing that a purchaser paid substantially less than its competitor for goods of like grade and quality sold by the respondent . . .". (R. 49) After briefly reviewing the facts, the Commission concluded that each of the discount differentials (ranging from the maximum of 6 per cent to as low as a difference of ½% between brackets) had the requisite anticompetitive effect.

No further evidence was introduced on remand. (R. 51) Nevertheless, the examiner, although confronted with the same record, rewrote his original decision, dropping various findings and adding others so as to conform with the Commission's opinion, and accordingly produced a decision stating that the requisite injury to competition had been established and that Section 2(a) had been violated. (R. 52)

On review, the Commission (one commissioner concurring in the result and another not participating)

adopted the examiner's second decision, with slight modifications not pertinent here. (R. 112) The Commission stated that the examiner's findings as to competitive injury were in accord with its views as set forth in its first opinion. (R. 118) The Commission made no findings that resale prices on biscuit products differed as between those customers of United which received the maximum discount and those which did not, that price was important in the resale of those products, that the retail sale of those products was competitive, that the discounts paid by United were substantial in dollar amounts, or that the discounts affected either resale prices or profits. The Commission also made no reference whatever to the testimony of the independent store owners expressly negating any adverse competitive effect from United's discounts. The Commission made clear that in its view, moreover, the violation proved was in the use of a graduated volume discount in and of itself, whether the combining of purchases by store outlets was present or not. (R. 118)

The Commission, rejecting United's objections, issued an order in the broad language of the statute directing United to "forthwith cease and desist from discriminating, directly or indirectly, in the price of . . . [food] products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale of such products." (R. 111)

On appeal, the Court of Appeals for the Seventh Circuit affirmed the Commission's order. (App. A, *infra*, pp. 1a-15a) On the question of the legal standard to be applied in determining the likelihood of sub-

stantial injury to competition, however, the court rejected the automatic inference test applied by the Commission, and supplied a new test of its own. The court, in rejecting as irrelevant the testimony of the independents that United's discounts were not significant, held:

> [E]ven though price discriminations covering a single item in a grocery store may appear relatively insignificant when considered alone, they may assume the stature of substantiality when considered in the context of the store's total operation and as an incipient harm which could grow into reality if extended to all of the items handled by the grocer. (App. A, *infra*, p. 11a)

This criterion of substantial probable effect on competition, which was adopted by the court as the proper one for this case, was said to be required by *F.T.C.* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

The court also rejected United's contentions that the order was unwarrantedly broad and vague and constituted no more than a restatement of the statute.

In addition to affirming the Commission's order to cease and desist, the court also upheld the Commission's denial of a motion by United to stay enforcement of that order. In that motion United moved that the Commission stay enforcement of the order against United until the Commission had acted to determine whether United's two major competitors, National Biscuit Company and Sunshine Biscuits, Inc., were in compliance with outstanding cease and desist orders against them so as to subject each company to the

same treatment at the same time.[4] (R. 123) United's motion alleged that both companies were still granting graduated volume discounts on the sale of their biscuit products, notwithstanding that the cease and desist orders against both companies forbade such practices. At an earlier point in the proceeding, the Commission had disclosed that no reports of compliance by either National or Sunshine had been "received and filed as showing compliance," and that reports therefore had "not been formally acted upon by the Commission and are still pending before it for consideration." (R. 96) United pointed out that if its two larger competitors were permitted to use graduated volume discounts while it was not, United would be placed at a grave competitive disadvantage. This motion was denied by the Commission. (R. 140-41) Far from really considering the serious competitive disadvantage which United would suffer by being required to give up volume discounts while its larger competitors continued to use them, the Commission summarily held that any "compliance question" concerning either National or Sunshine was a "matter to be separately considered on its own merits." (*Ibid.*)

REASONS FOR GRANTING THE WRIT

I.

This case presents a substantial and important question regarding the proper legal standards to be applied in administering the price discrimination provi-

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[4] The National Biscuit Company order was issued in 1944, *National Biscuit Company*, Docket No. 5013, 38 F.T.C. 213, and modified by the Commission in 1954, 50 F.T.C. 982. The order against Sunshine Biscuits, Inc. was issued in 1955, *Sunshine Biscuits, Inc.*, Docket No. 6191, 52 F.T.C. 110.

sions of the Robinson-Patman Act, namely whether competitive injury may be established upon a mere presumption of economic effect respecting wholly unrelated products instead of by factual findings based upon a reasoned analysis of record evidence of the actual market realities pertinent to the specific case and relating to the products as to which discrimination is charged. The decision of the court below in this case sets up a new legal test which would eliminate that price flexibility so essential for the competitive marketing not only of food products to retail grocers, but also, since the test is of general applicability, the competitive marketing of many other products in other sectors of the economy.

Before considering the new legal test employed by the court below, it is important to note that the basic standards for judging the legality of a price discrimination are set forth in Section 2(a) of the Robinson-Patman Act, which makes it unlawful for "any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . ." By its terms, two basic requirements must be satisfied to make out a violation: (1) a price discrimination by the respondent and (2) substantial actual or probable injurious effects on competition resulting from that discrimination.

In this case there is no question about the existence of the first prerequisite—a discrimination in price. This Court has held that a mere price difference is sufficient to show a discrimination in price within the meaning of the Act. See *F.T.C.* v. *Anheuser-*

Busch, Inc., 363 U.S. 536, 549 (1960). Here United's volume discounts did clearly produce differences in price; the key question is whether these differences produced the requisite injurious effects on competition.

The Court of Appeals recognized that United's volume discounts in themselves had not been shown to have a probable "substantial" adverse effect on competition. Unable to espouse the Commission's tacit assumption as to their effect, the court proceeded upon a new assumption of its own in order to supply the requisite injury to competition. It interpreted this Court's opinion in *F.T.C.* v. *Morton Salt Company*, 334 U.S. 37 (1948), as holding that a discrimination in price by one supplier on its product line (in this case in the biscuit products industry, with its long history of graduated volume discounts), which is in itself "relatively insignificant," may assume the stature of "substantiality" if projected to cover all the other products purchased by the customer from other suppliers. Under this interpretation the difference in price is condemned not because of any probable effects that *it* may have on competition, but solely because a similar discrimination in price, if in some conceivable way it were extended to all other products purchased by the customer from all other suppliers, might have a substantial adverse effect on competition. This theoretical test of injury, if accepted, would eliminate all volume discounts and every other form of price difference in the grocery trade and in all other businesses, retail, wholesale or otherwise, which handle more than a single product. For any discount, no matter how small, if projected to cover the thousands of grocery items handled by the average retail store, would assume the proportions of "substantiality."

The theory of the court below is based upon a misreading of this Court's opinion in *Morton Salt*. In that case this Court held that the various items handled by a grocery store must be treated separately, not collectively; hence if a grocery store customer were injured competitively with respect to one item, it would be no defense to show that his trade in this item constituted such a small portion of his total grocery store business that no injury to the latter could be found or assumed. The "interpretation" of *Morton Salt* offered by the Court of Appeals conflicts with this view, for it requires a consideration, which is necessarily hypothetical and speculative, of the entire stock of the grocer rather than a focusing upon the specific product purchased from the respondent.

In this connection it is important to note that the court's test is based only on speculative assumption. The record is devoid of evidence as to the existence, let alone the magnitude, of discounts or other price discriminations with respect to the multitudinous other items carried in a typical grocery store, and the Commission itself made no findings in this regard.

The Commission, moreover, has itself rejected the very theory advanced by the Court of Appeals. In *Fred Bronner Corp.*, Dkt. 7068, 57 F.T.C. 771 (1960), staff counsel for the Commission argued that a discount schedule was "illegal for the reason that if discounts at the same rate were granted to respondents' favored customers by all of their suppliers, the effect on competition would be substantial." In rejecting this interpretation of *Morton Salt*, the Commission stated: "The contention of counsel supporting the complaint that we project the discount to other merchandise

purchased by the favored customers is clearly beyond the holding in the *Morton Salt* case and must be rejected." (*Id.* at p. 784).

Quite apart from the Commission's express repudiation in *Bronner* of the "projection" theory, the Court of Appeals could not properly sustain the Commission's decision here on that theory when the Commission itself reached its decision on another ground. As this Court has stated:

> [A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Security & Exchange Comm'n.* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

See also *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-9 (1962).

As its resort to the across-the-board product projection theory indicates, the reviewing court clearly recognized that the Commission's order could not be sustained on the inadequate theory of the Commission that Section 2(a) forbids price differences merely because they occur within a keenly competitive, low-profit industry. In its opinion the Commission merely recited the historic facts about the retail grocery business in general—that it is highly competitive, that net profits are low, that prices are important—but it did not make any findings in any way relating United's volume

discounts to either the trade in biscuit products or to the grocery business as a whole. The Commission did not find that United's discounts were in fact substantial in amount; or that these discounts would have any adverse effect on the sale of biscuit products (*e.g.*, that the discounts were capable of producing or had produced differences in resale prices, or that the degree of competitiveness in the sale of biscuit products was such that price differences would be important in attracting customers). The Commission did not find that United's resulting higher prices to some customers, if not passed on in higher retail prices, would tend to cut substantially into the margin made on the resale of biscuit products, or that the sums received by customers receiving the maximum discount would tend to enhance significantly their competitive position. In short, the Commission's findings completely fail to disclose any meaningful relationship between United's discounts and a probable substantial injury to competition.

The Commission's position thus reduces to the thesis that in a price discrimination case alleging injury at the customer level, proof of illegality may consist *solely* of a showing that a price difference was charged competing customers in a competitive industry. The Commission, to be sure, describes its test more narrowly, stating that the price difference must be "substantial" and that "substantiality" turns on the "facts" in each case. But these qualifications are essentially meaningless, since the Commission, as pointed out above, has utterly failed to make findings as to any of the facts by which "substantiality" can be meaningfully measured.

A conclusion of illegality must, as in any Clayton Act case,[5] be based on the long-term, probable, foreseeable effects on competition of the seller's pricing. What must be decided is whether the discriminatory pricing is likely to cause changes in the market adverse to competition. Does it present a substantial danger to competition by favoring one class of customers over another class of customers? Will it, by giving some customers lower prices than others, tend to lessen competition substantially or create a monopoly in any line of commerce?

These and other related questions relevant to the inquiry into competitive injury can only be answered by examining the impact of any given price discrimination on the customers who are buying from the seller. Although the Commission did not question the actual appraisal of the competitive facts made by the examiner, in which he concluded that there was no competitive injury, it held as a matter of law that the wrong standard was used and imposed its own legal formula that an "inference" of competitive injury must be drawn from the mere fact that a seller does not maintain uniform prices to all customers. In doing so the Commission rendered the evidentiary hearing, including the testimony of the retail store witnesses called by the Commission itself, a meaningless exercise.

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[5] The same statutory test of injury to competition for price discrimination under § 2 is used for determining the legality of exclusive dealing arrangements under § 3 (*e.g.*, *Tampa Electric Co.* v. *Nashville Coal Company*, 365 U.S. 320 (1961)) and for determining the legality of acquisitions under § 7 (*e.g.*, *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 362 (1963)).

This automatic inference test is contrary to the purposes and underlying rationale of the price discrimination law, and denies the respondent the fact-finding hearing required by Section 11 of the statute. This test, moreover, is not dictated by this Court's opinion in *Morton Salt,* which was cited as the principal authority by the Commission. In that case this Court did not hold that the statutory requirement of injury to competition may be satisfied by a mere showing of any substantial price difference charged to competing customers; to say that it did is to ignore the factual context in which this Court decided that case and which serves to limit the opinion.

In *Morton Salt* this Court held that a "substantial" price differential sufficient to "influence resale prices" on a low-margin, price-competitive item permitted an inference of probable injury to competition. (334 U.S. at 47-48) Moreover, the facts of that case demonstrated that the quantity discount schedule used by Morton Salt had the effect of granting a substantially lower price to only five huge buyers purchasing more than 50,000 cases per year, while all other buyers had to purchase at substantially higher prices. In other words, the quantity discount schedule was so arranged that the disfavored customers could not as a practical matter qualify for the maximum discount. Under these circumstances, where substantially lower prices were given to one class of customers sufficient to influence resale prices, a finding of injury to competition was justified.

Similarly, in the so-called *Automotive Parts* cases,[6] which the Commission also cited as supporting precedent for the automatic inference test (R. 48-49), the discount schedules contained a spread so great that the higher discounts were available only to a few select large-buying customers. Not only were there high differentials in the volume discount schedules (ranging to 20 per cent in one case and 30 per cent in another case), but they were computed on the basis of annual sales. Price differentials of this type, in the industry context of keen competition in auto parts and tight profit margins, were held to warrant a finding of adverse competitive effects.

The recent case of *Foremost Dairies, Inc.* v. *F.T.C.*, 348 F. 2d 674 (5th Cir. 1965), *cert. denied*, 34 U.S. Law Week 3218, (Dec. 14, 1965) (No. 634) involved a situation comparable to that in *Morton Salt*. There the discounts were given on a product—milk—which was found to be a low-margin item; there were also findings that another customer not receiving the discount was compelled to reduce substantially his prices on milk to meet competition, and that such a price reduction would attract customers.

In this case, on the contrary, the product sold carries a relatively high markup—from 15 per cent to 25 per cent. (R. 177, 189, 198, 242, 259, 298) Furthermore, United's discounts did not have the effect of

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[6] *Moog Industries, Inc.* v. *F.T.C.*, 238 F. 2d 43 (8th Cir. 1956), *affirmed*, 355 U.S. 411 (1958); *C. E. Niehoff & Co.* v. *F.T.C.*, 241 F. 2d 87 (7th Cir. 1957), *modified*, 355 U.S. 411 (1958); *E. Edelmann & Co.* v. *F.T.C.*, 239 F. 2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958); *Whitaker Cable Corp.* v. *F.T.C.*, 239 F. 2d 253 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957); *Standard Motor Products, Inc.* v. *F.T.C.*, 265 F. 2d 674 (2d Cir. 1959), *cert. denied*, 361 U.S. 826 (1959).

creating separate classes of customers, since, as the undisputed evidence shows, the volume discounts were closely graduated and computed on a monthly basis so that they were freely and practically available to all customers, regardless of the size of the retail grocery establishments. For example, United's second schedule, *supra,* p. 6, starts at a low level, with a 1½ per cent discount for purchases of $25, and then moves upwards with incremental sales of varying amounts less than $20, by ½ or 1 per cent, to the maximum of 6 per cent for purchases of $150 or more. This closely graduated discount schedule permits individual customers to move easily from one discount level to another; and as seen in the tabulation set out in the opinion of the court below (App. A, *infra,* pp. 3a-4a, n. 2), the maximum of 6 per cent is within the reach of both independent and chain stores.

Obviously, United's discount schedule was not designed to exclude, nor did it have the effect of excluding, the independent grocer from the maximum discount. Indeed, until the Commission's second opinion, United was of the belief that the Commission's objection to its discount schedules was based solely on the store-combining feature by which chains were able to secure the maximum discount by combining the purchases of their many outlets. However, the Commission and the Court of Appeals have both ruled that the discounts were unlawful without the store-combining feature. Even with that feature, there has been a failure here to establish substantial competitive injury; without it there is not even a theoretical basis for arguing that the multi-market or chain stores were favored over the independent stores. Indeed, as the opinion of the court below shows, (App. A, *infra,* pp. 3a-4a, n. 2) without the store combining

feature, the independent retail stores in Gary, Indiana qualified for higher discounts than the chain outlets. A similar situation was revealed for the other two cities.

These undisputed record facts showing the actual competitive situation surrounding the use of United's discount schedules demonstrate the essential fallacy of the approaches taken by the Court of Appeals and the Commission. In both cases speculative theories of injury were substituted for an actual reasoned analysis of what happened in the marketplace. Perhaps there is an inevitable tendency for those charged with the task of prosecution to seek simplified enforcement tests, but this is a tendency, as this Court has stated, that must be resisted. In *Automatic Canteen* v. *F.T.C.*, 346 U.S. 61, 63 (1953), this Court warned that "simplified enforcement" of the price discrimination statute "might readily extend beyond the prohibitions of the Act and in doing so, help give rise to price uniformity and rigidity in open conflict with the purposes of other antitrust legislation."

This is exactly what has happened with the Commission's doctrinaire application of the *Morton Salt* decision. That decision has been so broadened and made rigid by Commission interpretations that inferences rather than evidentiary proof are now relied upon to forge the causal link between challenged price differences and claimed competitive harm. Furthermore, the product-projection test espoused by the court below, if adopted and applied, would require uniform pricing throughout a large part of our national economy. Its immediate impact would be in the grocery trade, but it would equally apply to all wholesale and retail establishments handling multiple

products. This would bring about a new rigidity in pricing. And since price uniformity is the very antithesis of competition, the end result would be a lessening of competition in our economy.

It is important that this Court resolve this conflict in standards which has become a center of controversy in recent years,[7] even to the point of dividing the members of the Federal Trade Commission. Recently, Commissioner Elman, in a strong dissent in another secondary-line price discrimination case (*American Oil Company*, 60 F.T.C. 1786 (1962)), pointed out the deficiencies in the Commission's mechanical extension of the *Morton Salt* decision. He stated:

> In other words, the legal formula which the Commission derives from *Morton Salt* is that "competition between buyers" *plus* "substantial difference in price" *equals* "significant competitive advantage" to the favored buyers, which in turn *equals* "probable injury to competition".
>
> The attractiveness of this formula cannot be denied. Its application dispenses with the need for inquiry into the probable effects on competition, either generally or with disfavored customers, of a price discrimination, so long as the difference in price is substantial in amount. But the Supreme Court surely did not intend in *Morton Salt* to relieve the Commission of the duty to make an informed expert judgment, based upon

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[7] See especially Edwards, The Price Discrimination Law, Ch. 16 (1959); Rowe, Price Discrimination Under the Robinson-Patman Act, Ch. 8 (1962), Supp. (1964); Edwards, *Tests of Probable Effect Under the Clayton Act*, 9 Antitrust Bulletin 369 (1964); Barnes, *The Robinson-Patman Challenge to Buyers' Competition*, 9 Antitrust Bulletin 415 (1964); Barton, *Competitive Injury Under the Robinson-Patman Act*, 19 The Business Lawyer 649 (1964); and Handler, *Recent Antitrust Developments—1964*, 63 Michigan L. Rev. 59, 78-85 (1964).

> the relevant economic facts, as to the likelihood of injury to competition resulting from differing kinds of price discrimination. The Court did not lay down a hornbook black-letter formula, to be applied automatically and indiscriminately to every type of price discrimination without regard to differences in economic effect. (*Id.* at 1815)

More recently, this Court itself warned against the inflexible application of mechanical word formulas. In *F.T.C.* v. *Sun Oil Company,* 371 U.S. 505 (1963), this Court cited with approval Commissioner Elman's dissent in *American Oil,* adding that: "In appraising the effects of any price cut or the corresponding responses to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made the substitute for adequate probative analysis." (*Id.* at 527)

II.

The order here flatly forbids all price discriminations to competing customers without limitation as to size, type, or duration. The Commission, by issuing an order of such breadth and generality, has exhibited again its insistence on striking down price differentials without regard to their economic effect, and, like the court in approving it, has disregarded the directive of this Court in *F.T.C.* v. *Henry Broch & Co.,* 368 U.S. 360 (1962), and the Congressional intent embodied in the amendatory legislation of 1959, that orders issued under the Act must be clear and precise rather than mere restatements or paraphrases of the statutory language.

This proceeding involved only the use of graduated volume discounts on sales of biscuit products to retail

grocery customers. The order issued, on the other hand, applies to any and all forms of price differentials on sales of all food products to any type of customer purchasing for resale, regardless of the impact of the differentials on competition.

The Court of Appeals apparently misapprehended the nature of United's contention with respect to the breadth of the order. It stated, "United also challenges the Commission's order as being too broad in prohibiting all price discriminations resulting from the use of volume discount schedules and not limiting it to those situations in which the purchases of multiple chain outlets in a particular area were combined for the purpose of discounts." (App. A, *infra.*, p. 13a) The court, having determined that volume discounts as such had been found illegal, therefore concluded that no question as to the breadth of the order was presented. As pointed out above, however, the order here covers all forms of price differentials, not just volume discounts.

In the *Broch* case this Court recognized that the change in the procedure for review and enforcement of Commission orders effected by the 1959 "finality" amendments (38 Stat. 734, 15 U.S.C. § 21, as amended July 23, 1959, Pub. L. 86-107, 73 Stat. 243) required that orders be subjected to more rigorous standards than had been applied under the Act prior to its amendment.

Even prior to *Broch*, this Court had made clear that administrative orders, to the extent that they proscribed practices other than those actually found to have violated the Act, must define "with reasonable specificity" the additional acts proscribed, and must rest on evidence and findings that those acts were "per-

suasively . . . related to the proven unlawful conduct," *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, 433 (1941). See also *Communications Workers* v. *N.L.R.B.*, 362 U.S. 479, 480-81 (1960). As pointed out in *Broch*, however, since no penalties could attach under the old Act until after an enforcement proceeding in the Court of Appeals, it was unnecessary and even "premature" to restrict the scope of an overbroad order at the initial stage of judicial review. Such action was rather to be taken at the point when enforcement was sought, for at that time the Court of Appeals could construe and tailor the order "in the setting of a specific asserted violation," and then determine whether the challenged practice was "identical with or like or related to the violations" which had been found to have been committed. (368 U.S. at 366)

Under the amendatory legislation, however, a Commission order, such as in the instant case, will become final either in the absence of review by the respondent or upon affirmance of the order. Thereafter, heavy penalties ($5,000 per day for each violation) may be imposed upon the respondent for violation of the order without further opportunity for construction or "tailoring" by the Court of Appeals. It thus becomes vital that orders, when issued, be "at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." (368 U.S. at 368)

The legislative history of the 1959 amendments also discloses a Congressional belief that the Commission's orders had hitherto been unduly broad and general, and an intention to alter that practice. (See 105 Cong. Rec. 12734-5; H.R. Rep. No. 580, 86th Cong. 1st Sess.;

cf. F.T.C. v. *Henry Broch & Co.*, 368 U.S. 360, 365, n. 6 (1962)).

Nevertheless, despite this Court's clear mandate in *Broch*, the Commission still continues to issue Section 2(a) orders in the language of the statute.[8] This form of order prohibiting all price differences to competing customers is particularly unwarranted here where the only form of price discrimination was United's use of volume discounts, which were held to be unlawful on the basis of legal tests unrelated to any factual evidence of injury to competition.

III.

The refusal of the Commission to grant a temporary stay of enforcement of its order against United was, under the special circumstances of this case, a patent abuse of discretion which should have been corrected by the Court of Appeals. Indeed, the court's decision in this respect is in direct conflict with a decision rendered less than two months later by another panel of the same court in *Universal-Rundle Corp.* v. *F.T.C.*, — F.2d — (7th Cir. 1965), reported in 1965 Trade

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[8] See, *e.g.*, *American Oil Co.*, 60 F.T.C. 1786, 1826 (1962), *rev'd on other grounds*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964); *Mueller Co.* v. *F.T.C.*, 323 F.2d 44, 47 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964); *Tri-Valley Packing Ass'n.*, 60 F.T.C. 1134, 1182 (1962), *rev'd on other grounds*, 329 F.2d 694 (9th Cir. 1964); *Joseph A. Kaplan & Sons* v. *F.T.C.*, 347 F.2d 785, 788 (D.C. Cir. 1965); *Monroe Auto Equipment Co.* v. *F.T.C.*, 347 F.2d 401 (7th Cir. 1965), *petition for cert. filed*, 34 U.S. Law Week 3085 (U.S. Sept. 21, 1965) (No. 565). *Cf.* Austern, *Five Thousand Dollars A Day*, 21 A.B.A. Antitrust Section 285, 308 (1962); Rowe, *Price Discrimination Under The Robinson-Patman Act*, p. 153 (1964 Supp.).

Cases ¶71,578. This conflict in decisions also requires corrective action by this Court.

In *Moog Industries, Inc.* v. *F.T.C.*, 355 U.S. 411 (1958), this Court recognized that while the determination whether to postpone the effective date of a cease and desist order so as to achieve uniform application of the law is normally within the discretion of the Commission, an abuse of that discretion can be set aside by the reviewing Court of Appeals. (*Id.* at 414) Unlike the situation in *Moog,* allowance of the stay requested here would not require the Commission to institute and complete possibly lengthy and costly complaint proceedings against a large number of other firms in the industry. The stay requested by United related to only *two* other companies, with respect to each of which the Commission had, over ten years ago, instituted proceedings and obtained consent cease and desist orders.

The complaint against National Biscuit Company issued over 20 years ago, and the complaint against Sunshine Biscuits, Inc., 11 years ago. (R. 125-27) In each case the complaints were directed against the use of volume discounts substantially similar to those of United, and the orders against both National and Sunshine prohibit such discounts. Yet, despite some changes in the schedules employed over the years, both National and Sunshine have continued to grant essentially the same discounts as before. (R. 129-31) This continued practice does not necessarily reflect a determination by the Commission that those volume discounts are legal, for the Commission has itself stated in the instant proceedings that no report has been received and filed by either National or Sunshine as

showing compliance by either company, notwithstanding that the orders against each of these companies required that reports of compliance be filed within sixty (60) days thereafter. (R. 96)

Thus, although it had determined that National and Sunshine had violated Section 2(a), the Commission, deliberately or by inaction, has simply failed to follow through and make that determination effective. At the same time, because of the limited scope which the Commission gives to the statutory defense of meeting competition, the very fact of the Commission's issuance of orders against National and Sunshine prevents United from employing that defense because its competitors' discounts are not lawful.

Because the National and Sunshine orders issued before the enactment of the Finality Act of 1959, those orders are without effect unless the Commission seeks affirmative enforcement, which it has not done. Since the Commission has failed to implement these orders, National and Sunshine, which rank, respectively, first and second in the biscuit products industry (R. 132), are free to continue using their discount schedules whereas United, with an order governed by the immediate and severe penalties imposed by the 1959 Finality Act, would be compelled to give up its discounts as soon as the order becomes final. See *Sperry Rand Corp.* v. *F.T.C.*, 288 F.2d 403, 404 (D.C. Cir. 1960). The effect of this disparity in treatment is not only to subject United to grave and irreparable competitive injury, but also to severely injure competition in biscuit products in general by further enhancing the position of National, already the dominant company in the industry.

The court's opinion in this case was handed down on August 9, 1965, by a panel composed of Chief Judge Hastings and Judges Duffy and Swygert. On October 22, 1965, in the case of *Universal-Rundle Corporation* v. *F.T.C., supra,* another panel of the same court, composed of Judges Duffy, Schnackenberg, and Knoch, handed down a decision in which, without discussion or even mention of the decision in this case, the court set aside the Commission's refusal to stay a cease and desist order under closely similar circumstances.*

In *Universal-Rundle,* as in the present case, the Commission had entered a cease and desist order based on a finding that discounts granted by Rundle to its customers constituted secondary-line price discriminations violative of Section 2(a) of the Act. Rundle then filed a petition with the Commission asking that the Commission stay its order pending initiation of an investigation into what Rundle alleged were similar discount practices by other members of the industry, and institution of whatever proceedings the Commission might deem appropriate to correct those practices. Rundle alleged that its competitors were in fact granting larger discounts than those which it was granting, and, moreover, that Rundle's share of the industry was only 5.75 percent as compared with 32 percent held by its largest competitor.

The Court of Appeals in *Universal-Rundle* held that in view of the alleged general prevalence in the industry of the practice involved, the Commission's selection

* A petition filed by the Commission asking for a rehearing *en banc* was denied by the full court on December 17, 1965, with one judge dissenting.

of Rundle as a target was "inequitable," "unjustified," and a "patent abuse of discretion." Since the industry consisted only of a few members, the court stated, no reason appeared why the Commission could not "seek a final decree covering all of them." (1965 Trade Cases at p. 81, 612)

Universal-Rundle and the present case thus have in common that a smaller company has been injuriously singled out to the advantage of larger competitors engaged in substantially similar practices, and that the result of such singling out is to benefit "the giants in the field" rather than the public. Moreover, in *Universal-Rundle* the consequence of the court's action is to require the Commission to initiate proceedings against an entire industry. In this case the Commission is being asked only to perform its ministerial duty of completing proceedings against two companies, the adjudicative phase of which was ended over ten years ago. The conflict of the decisions of the Seventh Circuit in this case and in *Universal-Rundle* presents a serious question in an important area of administration of the Act and requires resolution by this Court. The Commission itself in its petition for rehearing in *Universal-Rundle* (p. 4) openly acknowledged the conflict between these two decisions.

In view of the contingency that the Commission may seek certiorari in this Court in the *Universal-Rundle* case, United respectfully suggests that this Court may wish to withhold decision on this petition until the Commission has had time to file a petition in the *Universal-Rundle* case so that both petitions may be considered together.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

(1) Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

SEVENTH CIRCUIT

UNITED BISCUIT COMPANY OF AMERICA, Petitioner,

v.

FEDERAL TRADE COMMISSION, *Respondent.*

No. 14639

Aug. 9, 1965.

Before HASTINGS, Chief Judge, and DUFFY and SWYGERT, Circuit Judges.

SWYGERT, Circuit Judge:

Petitioner United Biscuit Company of America seeks review of a cease and desist order of the Federal Trade Commission and a subsequent order of the Commission denying a stay of the cease and desist order. The Commission found petitioner guilty of violating section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a).[1]

United is a Delaware corporation with its principal office and place of business in Melrose Park, Illinois. It manufactures and sells cookies and crackers, referred to collectively as biscuit products. Petitioner conducts its operations through eight geographical divisions. The Sawyer Division covers an area comprising Illinois, and portions of Indiana, Iowa, Wsconsin, Michigan, Kentucky, and Missouri.

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[1] Section 2(a) provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, * * * to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition * * *.

The activities investigated by the Commission dealt with sales by the Sawyer Division to its retail grocery store customers during the year 1959. These customers can be divided into those owning and operating only one grocery store, referred to in the complaint as "independents," and those owning and operating more than one store, referred to as "chains." The latter include major corporate chains, such as The Great Atlantic & Pacific Tea Company, The Kroger Company, and National Food Stores, as well as smaller corporate or individually owned chains.

The complaint charged that the Sawyer Division used graduated monthly discount schedules to discriminate in price between its customers; that these schedules, allowing for discounts up to six per cent, were based on the dollar volume of purchases made by each store; and that if a purchaser had more than one store, such as a corporate chain, its discount was calculated on the basis of the aggregated purchases of the stores operated by that purchaser. As a result, it was alleged, individual outlets of the chains as well as supermarkets (large independents) were enabled to earn larger discounts than competing smaller independents. In its answer, United admitted that its Sawyer Division priced pursuant to the challenged discount schedules, and that some of Sawyer's purchasers "who own only one retail grocery store may from time to time receive no discount or less than six per cent depending on the volume of their purchases, and that the volume of their purchases may be more than those for an individual store owned by purchasers owning more than one such store." United did not attempt to defend its policy by urging cost justification or a meeting of competition.

The Commission's case with respect to the actual operation of petitioner's discount practices was based on the purchases made and the discounts earned during two separate three-month periods of 1959 by thirteen independent

stores and by a few chain store outlets located in portions of three communities served by the Sawyer Division—Gary, Indiana; South Bend, Indiana; and Burlington, Wisconsin. The purchases and discounts for each test store during the six months involved are not in dispute. They are set out at length in the record.[2] They indicate that most

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[2] The following is a representative example of the discount payments made to the test stores:

GARY, INDIANA

STORE	Monthly Purchases	Per Cent Discount	Discount Payable	Additional Amount Payable at 6%
January 1959				
Independents:				
Better Foods, Inc.	$ 11.67	0	$ 0.00	$ .70
Gene's Super Market	117.16	5	5.86	1.17
Tobe's Super Market	319.42	6	19.17	—
Wally's Fifth Ave. Mart	45.37	4	1.81	.91
Chains:				
A & P	82.61	6	4.96	—
Kroger Store No. 628	43.42	6	2.61	—
February 1959				
Independents:				
Better Foods, Inc.	18.82	0	0.00	1.13
Gene's Super Market	116.38	5	5.82	1.16
Tobe's Super Market	333.97	6	20.04	—
Wally's Fifth Ave. Mart	43.21	3	1.30	1.29
Chains:				
A & P	62.79	6	3.77	—
Kroger Store No. 628	47.28	6	2.84	—
March 1959				
Independents:				
Better Foods, Inc.	41.68	3	1.25	1.25
Gene's Super Market	130.95	6	7.86	—
Tobe's Super Market	439.88	6	26.39	—
Wally's Fifth Ave. Mart	33.19	2	.66	1.33
Chains:				
A & P	83.13	6	4.99	—
Kroger Store No. 628	103.94	6	6.24	—

of the major retail grocery stores and a few of the large independents received a 6 per cent volume discount. Other stores received discounts varying from 1½ per cent to 5 per cent. Some received no discount. The Commission found that as a result of the differences in the volume discounts, United charged some customers a higher price for

GARY, INDIANA

STORE	Monthly Purchases	Per Cent Discount	Discount Payable	Additional Amount Payable at 6%
October 1959				
Independents:				
Better Foods, Inc.	28.35	1½	.42	1.28
Gene's Super Market	66.63	2½	1.67	2.33
Tobe's Super Market	170.71	6	10.24	—
Wally's Fifth Ave. Mart	24.78	0	0.00	1.49
Chains:				
A & P	26.28	6	1.58	—
Kroger Store No. 628	123.27	6	7.40	—
November 1959				
Independents:				
Better Foods, Inc.	25.02	1½	.38	1.12
Gene's Super Market	138.92	5	6.95	1.39
Tobe's Super Market	99.93	3½	3.50	2.50
Wally's Fifth Ave. Mart	26.64	1½	.40	1.20
Chains:				
A & P	50.60	6	3.04	—
Kroger Store No. 628	.56	6	0.03	—
December 1959				
Independents:				
Better Foods, Inc.	21.86	0	0.00	1.31
Gene's Super Market	106.05	3½	3.71	2.65
Tobe's Super Market	0.00	0	0.00	—
Wally's Fifth Ave. Mart	58.30	2	1.17	2.33
Chains:				
A & P	57.33	6	3.44	—
Kroger Store No. 628	14.86	6	0.89	—

like goods than it charged a competing customer or competing customers.

After counsel in support of complaint had rested his case in chief, United moved to dismiss the complaint. The hearing examiner granted the motion on the ground that although United's pricing practices "may constitute a price discrimination under § 2(a) of the Clayton Act," the Commission had not "sustained the burden of proof of competitive injury imposed upon [it] by law."

On appeal by counsel in support of the complaint, the Commission set aside the examiner's decision and remanded the case to him, stating that unless the showing on the record was "rebutted or justified, the evidence is sufficient to support an order against respondent to cease and desist. * * *" No further evidence was introduced by either party. Upon remand the examiner issued a new initial decision and concluded that a violation of section 2(a) had been established. He issued an order requiring that United:

> [I]n connection with the sale and distribution of * * * [its] products, including cookies and crackers * * * cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price.

United thereupon petitioned the Commission to review the hearing examiner's decision, challenging the sufficiency of the evidence and the findings as showing a violation of the Act, and also objecting to the scope of the examiner's order.

During the pendency of the review proceeding before the Commission, United filed a motion for certain com-

pliance reports filed with the Commission by National Biscuit Company and Sunshine Biscuits, Inc., the two major competitors of United. United alleged that National and Sunshine appeared to be granting quantity discounts on biscuit products to their retail grocery customers despite the existence of certain outstanding cease and desist orders against them, and that issuance of an order against United banning all purchase discounts would place petitioner at a competitive disadvantage. The Commission denied the request for disclosure stating that the reports had not been acted upon by it and that, in any event, there had been an insufficient showing that the orders in the other cases were relevant to this case since "each matter before the Commission must be considered on its own merits."

The Commission thereafter issued its final opinion. It adopted the examiner's findings and conclusions with minor modifications not pertinent to the instant review. The Commission concluded that United's price discriminations "may be substantially to lessen competition * * * and to injure, destroy, and prevent competition * * *" and that accordingly United had violated section 2(a) of the Clayton Act. In formulating its cease and desist order, the Commission modified the examiner's order by substituting for the phrase "their products, including cookies and crackers" the phrase "their food products," and limited the order to sales to purchasers competing in the resale of petitioner's products, but rejected United's contention that the order should be limited to "biscuit products." The Commission in its decision rejected petitioner's contention that the violation of the Act found here consisted only of favoring chains as against independents by permitting the former to combine the purchases of their outlets. It held that there was "a violation shown with or without the evidence of the combining of chain purchases." The Commission also rejected petitioner's

request that the order be limited so as to cover only this practice.

United thereafter moved the Commission to withdraw entry of its order and to stay its re-entry until the Commission had completed the proceedings pending against National and Sunshine. This motion was denied. United then filed the instant petition for review.

United raises three separate issues: (1) whether the Commission's finding that petitioner's pricing practices may be to adversely affect customer competition is supported by substantial evidence; (2) whether the Commission's order is too broad in its scope; and (3) whether the Commission abused its discretion by refusing to stay the effective date of its order until it had passed upon the compliance by petitioner's competitors with orders issued against them.

I.

Section 2 (a) of the Clayton Act prohibits price discriminations when the effect "*may be substantially* to lessen competition * * * or to injure, destroy, or prevent competition." (Emphasis added). In applying the statute, this court in Whitaker Cable Corp. v. F.T.C., 239 F.2d 253, 256 (7th Cir. 1956), cert. denied, 353 U.S. 938, 77 S.Ct. 813, 1 L.Ed.2d 761 (1957), said that price differentials *per se* are not outlawed. "The Act was not intended to reach every remote, adverse effect on competition. The effect must be substantial." It is also important, however, to remember that price discriminations do not need to have resulted in actual injury in order to come within the statutory ban. "It is enough that they may have the prescribed effect." E. Edelman & Co. v. F.T.C., 239 F.2d 152, 154 (7th Cir. 1956), cert. denied, 355 U.S. 941, 78 S.Ct. 426, 2 L.Ed.2d 422 (1958). Thus the statute seeks "to reach such discriminations 'in their incipiency,' before

the harm to competition is effected." Corn Products Refining Co. v. F.T.C., 324 U.S. 726, 738, 65 S.Ct. 961, 967, 89 L.Ed. 1320 (1945).

United contends that the evidence does not support the finding that its discount practices result in price discriminations that may substantially lessen competition. It says that the discounts are, under any view, insubstantial. It maintains that the small dollar amounts earned by those customers granted discounts are minimal even when they constitute the maximum six per cent discount. Consequently, United argues that the discounts, particularly when translated into dollar amounts, are incapable of producing any anticompetitive effect.

We realize that the dollar amounts representing the discount differentials are small and not as great as those found in many prosecutions for section 2(a) Clayton Act violations. Nevertheless, for reasons hereinafter given, we think there was sufficient evidentiary support for the Commission's finding that there was a likelihood of substantial anticompetitive injury.

The fact that the discounts granted by United increase up to six percent belies the claim that the price differentials as such are insubstantial. The apparent purpose of a graduated discount system is to afford some customers greater profits. As the volume of a customer's purchases grows the percentage of his discount increases, resulting in the opportunity either to realize a greater margin of profit per package or to reduce his retail price in relation to his competitors. There would seem to be no purpose for United to burden itself with maintaining its pricing practices unless it believed that the discounts are sufficiently attractive to induce a greater volume of purchases from its customers. It follows that if the discounts are intended as an inducement, necessarily they must be considered of a substantial character.

United correctly points out, however, that the "substantiality" requirement of the statute relates not to the price differentials, but to their effect upon competition. It then charges that the Commission ignored this distinction by holding that substantial injury to competition may be inferred if the discount to one customer is substantially more than that given his competitors. In other words, United argues that in effect the Commission applied a *per se* test in finding that the anticompetitive effect of petitioner's pricing practices would be substantial rather than minimal. We are convinced, however, that the Commission did not make the finding solely on the basis of the differences in the percentages of the discounts or of the amounts of the discriminations. All of the facts and circumstances of the case, including the amount of the discounts, were considered by the Commission in reaching its conclusion.

Independent store owners testified generally as to the highly competitive nature of the retail food business and that net profits are low; consequently, cash discounts and other allowances are important. One store owner testified "[W]e have to fight not only for pennies but for fractions." Moreover, certain of the independent store witnesses testified that price was a very important, if not the most important, factor in enabling them to compete. There was also testimony from these witnesses to the effect that if they could buy cheaper they could sell for less and that customers will, in the overall picture, buy where the prices are lower. The Commission said that "considering the highly competitive nature of the market and the other factors mentioned, a volume discount of 6% • • • was clearly substantial. Likewise substantial were the lesser discounts shown ranging up to 6%." The Commission concluded that there was sufficient evidence "to find that the competitive opportunities of certain purchasers were injured when they had to pay respondent

[United] substantially more than their competitors had to pay and that the effect may be substantially to injure, destroy or prevent competition with the purchasers receiving the benefit of such discriminations."

United claims that the majority of independent store owners who testified stated that they would not be adversely affected by the discount differentials received on United's products. In this connection petitioner calls attention to the examiner's statement:

> The witnesses were asked whether their business would be substantially affected or injured by receiving a lesser discount than a competitor on the same amount of purchases of respondent's products. Six replied in the negative. One testified that he would be injured only if competitors substantially cut their prices; the answers of three others were inconclusive. One answered in the affirmative.

Regardless of this, we are of the opinion that the "substantiality" question here does not depend upon the store owners' estimation of the possibility of injury by reason of United's pricing practices. The incipient harm to competition that may be present if the challenged discriminations should continue is not to be determined solely by the opinions of the store owners. That determination must be made by the Commission through an exercise of its special competence and upon the basis of all the attendant facts and circumstances with particular reference to the type of business under investigation.

We are in agreement with the Commission that the test for competitive injury set forth in F.T.C. v. Morton Salt Co., 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948), should govern this proceeding. There, the Court was confronted with the sale of an item, which like those in the present case, was a relatively minor one when considered in the

overall operations of a retail grocery store. Nevertheless, in prohibiting the price discriminations found in that case, the Court said:

> There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store. Supra at 49, 68 S.Ct. at 829.

United argues that Morton Salt holds that competitive injury caused by discounts given on one product cannot be justified merely because the customer deals in many other products. It is true that this is one possible interpretation of the Court's language. It is possible, however, to find in it a quite different meaning, namely, that even though price discriminations covering a single item in a grocery store may appear relatively insignificant when considered alone, they may assume the stature of substantiality when considered in the context of the store's total operation and as an incipient harm which could grow into reality if extended to all of the items handled by the grocer. We believe that this latter interpretation is the correct one and that it should be adopted in testing the likelihood of substantial competitive harm inherent in United's pricing practices.

United also contends that the Commission's order extends beyond those price discriminations challenged in the complaint, that is, that it has ruled illegal all price discriminations using the volume discount schedules and

did not limit the illegality to those discriminations that arose from its practice of allowing chains to combine the purchases of their various outlets located within a particular area. We have read the complaint and examined the record. We find that the Commission's order is consistent with its complaint and with the theory on which it prosecuted this case. We agree with the Commission's statement: "The combining of the purchases of chain store outlets was a contributing factor, but the real illegality here found was due to the differences in net prices as a result of using volume discount schedules. There is a violation shown with or without the evidence of the combining of chain purchases."

II.

United next challenges the Commission's order as being too broad in its scope: (1) in its products coverage by issuing an order covering "food products" rather than "cookies and crackers" and (2) in its prohibition of practices by not restricting the order to the price discriminations arising from the outlet-combining aspect of its discount schedules.

Having found that there was warrant for the Commission's finding that United violated section 2(a) in the distribution of its biscuit products, we hold that the Commission was authorized to fashion its order to prohibit United's use of such illegal practices in the distribution of any of its "food products." In other cases it has been held that it is reasonable for the Commission to frame its order in such a way as to prohibit practices found to be illegal in the sale of one product in conjunction with the sale of other products. F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965); Niresk Indus. v. F.T.C., 278 F.2d 337 (7th Cir. 1960), cert. denied, 364 U.S. 883, 81 S.Ct. 173, 5 L.Ed.2d 104.

In challenging the broad formulation of product coverage, United cites F.T.C. v. Henry Broch & Co., 368 U.S. 360, 82 S.Ct. 431, 7 L.Ed.2d 353 (1962), as authority for the proposition that the 1959 amendments to section 11 of the Clayton Act require that the Commission orders be very narrow and precise.[8] It should be noted, however, that the language quoted from Broch by petitioner here did not refer to that part of the order in Broch relating to broad product coverage. The recent decision in Colgate-Palmolive Co., supra, indicates that Broch cannot be held as authority for the proposition which petitioner urges.

United also challenges the Commission's order as being too broad in prohibiting all price discriminations resulting from the use of volume discount schedules and not limiting it to those situations in which the purchases of multiple chain outlets in a particular area were combined for the purpose of discounts. This argument is consistent with petitioner's contention that this proceeding was limited to the outlet-combining aspect of the discount schedules. Having determined as we have earlier that the Commission's decision was consistent with the complaint and the theory on which it prosecuted this case, we now rule that the order is not too broad in its prohibitions but covers those practices which United was found to have used and which were determined to be violative of the Act.

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[8] Petitioner cites the following from F.T.C. v. Henry Broch & Co., 368 U.S. 360, 367-368, 82 S.Ct. 431, 436 (1962):

> We do not wish to be understood, however, as holding that the generalized language of paragraph (2) would necessarily withstand scrutiny under the 1959 amendments. The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.

III.

Petitioner contends that the Commission erred in refusing to stay the effective date of its order until the Commission has completed its pending proceedings against petitioner's competitors. In earlier proceedings, the Commission prohibited both National Biscuit Company and Sunshine Biscuits, Inc. from offering the type of price discounts similar to those used by United. Both of these competitors have now submitted compliance reports to the Commission which has not as yet determined whether the reports establish compliance. Petitioner urges that the order against it should not issue until it has been determined whether or not its competitors are complying with the Commission's orders. If they are not, petitioner argues, and if United does comply with the present order against it, it will be placed at a serious competitive disadvantage. We agree with the Commission that the compliance or noncompliance of the other companies is a separate question which ought to be considered on its own merits. The commission need not hold an order against one company in abeyance until it proceeds similarly against all others. Otherwise, Commission orders would be forever pending and unlawful practices rarely, if ever, corrected. The "decision as to whether or not an order against one firm * * * should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission." Moog Indus., Inc. v. F.T.C., 355 U.S. 411, 413, 78 S.Ct. 377, 379, 2 L.Ed.2d 370 (1958).

The Commission's orders are affirmed and the cease and desist order will be enforced.

(2) Final Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Monday, August 9, 1965

Before

HON. JOHN S. HASTINGS, *Chief Judge*
HON. F. RYAN DUFFY, *Circuit Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*

No. 14639

UNITED BISCUIT COMPANY OF AMERICA, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Petition for review of orders of the Federal Trade Commission.

This cause came on to be heard on the petition for review of orders of the Federal Trade Commission and the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the orders entered by the Federal Trade Commission on February 7, 1964 and April 10, 1964 be, and the same are hereby AFFIRMED, and the cease and desist order will be enforced, in accordance with the opinion of this Court filed this day. Upon presentation, an appropriate decree will be entered.

APPENDIX B

(1) First Initial Decision

BEFORE FEDERAL TRADE COMMISSION

• • (Caption—7817) • •

INITIAL DECISION AS TO COUNT I.

Leon R. Gross, Hearing Examiner.

Ross, McGowan & O'Keefe, by Roland D. Whitman, Esq., of Chicago, Illinois, for Respondent.

Cecil G. Miles, Esq., Counsel Supporting the Complaint.

This complaint, issued on March 10, 1960, charged respondent in Count I with violation of §2(a) of the Clayton Act as amended, and in Count II with violation of §2(d) of the Act. On August 30, 1961, the Federal Trade Commission vacated and remanded an initial decision of July 20, 1961, which dismissed the charges in Count I of the complaint.

The Commission vacated the aforesaid decision because the hearing examiner had not made a finding under §3.8 (e) of the Commission's Rules that granting respondent's motion to dismiss Count I terminated the proceeding before him. That decision of July 20, 1961, did not terminate the proceedings before the examiner because Count II, which charged a violation of § 2(d) of the Act, was then undisposed. Counsel had agreed prior to July 20, 1961, to attempt to dispose of Count II under §§ 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, published May 6, 1955, as amended, and the decision so stated.

The hearing examiner is now reissuing this decision as to Count I and is simultaneously issuing a separate decision as to Count II. That disposition of Count II is being made pursuant to §§ 3.21 and 3.25 of the Commission's Rules and pursuant to notice of intention filed by the parties prior to September 1, 1961. The initial decision as to Count II contains a cease-and-desist order which is sub-

ject to review and approval by the Federal Trade Commission before it becomes final and effective. However, the issuance of the initial decision as to Count II makes it possible to find, and the examiner hereby finds, that there is nothing further pending before him either as to Count I or as to Count II of this complaint.

Having made such findings, the examiner hereby reissues his initial decision as to Count I of the complaint, with certain minor changes, as follows:

The hearing examiner hereby sustains respondent's motion of April 28, 1961, at the close of the Commission's case-in-chief to dismiss Count I of the complaint.[1] That motion is sustained for failure of the evidence to prove the competitive injury required to be shown under § 2(a) of the Clayton Act, as amended (15 U. S. C. § 13(a)).

Commission counsel completed their case-in-chief on March 7, 1961. On May 19, 1961, respondent filed a brief in support of its motion to dismiss Count I. On June 16, 1961, Commission counsel filed his answering brief, and on July 17, 1961, respondent filed its reply to the Commission's brief. Introduction of evidence in support of the complaint has been completed, but findings of fact and conclusions of law have not been either ordered or filed.

The hearing examiner finds and concludes from all the evidence:

1. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding, and this proceeding is in the public interest. The complaint filed herein stated a good cause of action against respondent but the evidence adduced in support of the allegations

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[1] A late Commission decision setting forth the basis for evaluating the evidence at this stage of the proceeding is in Docket 7000, Consolidated Foods Corporation, Opinion of Commission on Interlocutory Appeal, *CCH Trade Reg. Rep.*, par. 28,821.

of Count I of the complaint has failed to prove that the effect of respondent's discount schedules "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition" as alleged in the complaint.

2. Respondent, United Biscuit Company of America, a Delaware corporation, whose principal office and place of business is at 25th and West North Avenue, in the city of Melrose Park, State of Illinois, is engaged on a nationwide basis in the manufacture and sale of cookies, crackers, and biscuit products. Its operations are conducted through eight divisions in various geographical areas covering most of the United States. With minor exceptions, each division is exclusively responsible for the manufacture and sale of biscuit products within its respective area. Each division has its own discount policy and sets policies which vary from division to division.

3. For the year ending December 31, 1959, respondent's gross sales were approximately $138 million, and the sales of its Sawyer Division accounted for approximately $12 million.

4. The evidence adduced by Commission counsel, with immaterial exceptions, related solely to respondent's Sawyer Division. Different discount schedules were utilized by different divisions. From July 1, 1958, to June 30, 1959, respondent's Sawyer Division granted its customers cumulative volume discounts on their purchases as follows:

Monthly Purchases	Discount
$ 00.00 to $ 24.99	0%
25.00 to 39.99	2%
40.00 to 69.99	3%
70.00 to 99.99	4%
100.00 to 124.99	5%
125.00 and over	6%

From July 1, 1959 to March 10, 1960 (date of issuance of complaint), it granted discounts as follows:

Monthly Purchases	Discount
$ 00.00 to $ 24.99	0%
25.00 to 44.99	1½%
45.00 to 59.99	2%
60.00 to 74.99	2½%
75.00 to 89.99	3%
90.00 to 109.99	3½%
110.00 to 129.99	4%
130.00 to 149.99	5%
150.00 and over	6%

In the case of a customer making individual monthly purchases of less than $500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are $500 or more without regard to the amount of said customer's own monthly purchases (Tr. 20, as corrected). Corporate chains such as the Kroger Company and the Great Atlantic & Pacific Tea Company, which operate multiple units but have one common corporate ownership, have their purchases aggregated by area, and the discount is paid to the corporate chain's headquarters, which operationally conducts that chain's business in a particular area.

5. Respondent's Sawyer Division operates generally in an area composed of the States of Illinois, and portions of Indiana, Kentucky, Missouri, Iowa, Wisconsin, and Michigan. Within the division there are in excess of 20,000 retail grocery customers.

6. Even though the operational practices and policies may vary from division to division, the corporate respondent, United Biscuit Company, is legally responsible for the pricing practices and policies of each and all of its divisions. If a violation of § 2(a) of the Clayton Act had been proven with reference to any of the divisions, the cease

and desist order which would issue would as a matter of law have to bind the corporate respondent. Respondent's divisions are not separate legal entities.

7. Commission counsel called as witnesses officials of respondent who explained its general corporate structure and operations, and explained certain exhibits prepared for the Commission by respondent upon the Commission's request. In addition, the owners of "Ma and Pa" grocery stores (individually owned grocery stores which were not a member of the buying group nor the unit of a corporate chain) in Burlington, Wisconsin, and South Bend and Gary, Indiana, testified concerning the general operations of their stores with particular reference to their business relationships and practices with respondent. Such store owners were: in Burlington, Wisconsin, Donald Rehberg, Paul Spiegelhoff, John Knutowski, and Robert C. Grossman; in Gary, Indiana, Walter Pall, Jack Landsman, Oscar Noak, and Irving Tobe; and in South Bend, Indiana, Dennis Horvath, Earl Walter Plack, Marion Nowicki, and Vincent A. Koziatek. Annual sales for some of these stores were: $1 million, $500,000, $417,000, $360,000, $320,000, $240,000, $125,000, and $120,000.

8. The retail sales of respondent's biscuit products constitute a fractional percentage of the over-all gross sales of these stores. If the retail sales of respondent's biscuit products were deducted from these stores' gross sales, it would not materially reduce the over-all sales figure or lower the net profit to the store owners by any material amount. The profit margin is small for the stores whose owners testified. The net profit margin in the retail grocery business as an industry is generally understood to be low in relation to gross sales. The Commission witnesses, the above-named independent grocers, testified that they endeavored to keep their biscuit products priced at approximately the same level as their competitors; that chain stores provide strong competition for them; but that uniformly the retail grocery business is highly competitive.

9. The independent owners are unable to match the over-all lower prices of the chains and particularly the special sales prices of the chains. The independents are unable to meet the indirect price reductions implicit in the use and issuance of trading stamps. They cannot advertise as extensively as the chains, and several of them do no advertising except by papers and posters on their premises. Their stores are unable to match the chain's expensive physical plants, air conditioning, parking lots, larger and more attractive display areas, and other physical features which cause the corporate chain stores to be more attractive to customers and to provide more comfortable places to shop. If the chain stores stay open for the same number of hours as the independents, the traditional advantage which staying open longer hours formerly gave the independents clearly disappears. There are many complex factors which enter into the ability of the independent grocery store operator to compete successfully with the corporate chains and with the members of the buying groups. A few dollars per annum difference in the cost of respondent's biscuit products is a relatively remote and unimportant factor. Moreover, the hearing examiner received the distinct impression from the testimony of the store owners that, except for one or two, their businesses are growing and their annual sales are increasing. If, therefore, these independent owners were produced as examples of businessmen who had been competitively injured by respondent's discount schedules, they failed to prove such injury or the possibility thereof.

10. The competitive injury asserted by Commission counsel is to secondary line competition. Commission counsel have neither proffered nor adduced any evidence, nor claimed that United's discount schedules have the capacity to injure competitively other business concerns who compete with United. It is not clear whether the competitive injury is asserted as having been inflicted upon the independents vis-a-vis independents, or the independ-

ents vis-a-vis the corporate chains. If it is the independent vis-a-vis the corporate chain where the competitive injury is supposed to have occurred, this record lacks any evidence of such injury due to respondent's discount schedules.

11. The witnesses were asked whether their business would be substantially affected or injured by receiving a lesser discount than a competitor on the same amount of purchases of respondent's products. Six replied in the negative. One testified that he would be injured only if competitors substantially cut their prices; the answers of three others were inconclusive. One answered in the affirmative.

12. The hearing examiner rejects respondent's argument that the Commission's proof is too limited in time or geographical area to support a finding of the competitive injury required by § 2(a). Had actual proof of such competitive injury been adduced, it would have supported a cease and desist order against respondent generally.

Respondent's discount schedules may constitute a price discrimination under § 2(a) of the Clayton Act according to *Anheuser-Busch* v. *FTC*, 363 U. S. 536, because a price discrimination within the meaning of § 2(a) is merely a price difference. However, at page 550 in Anheuser-Busch, the Supreme Court pointed out that the statute itself spells out the conditions which make a price difference legal or illegal. The Court remanded Anheuser-Busch to the Seventh Circuit for that court to make a determination whether the record would support a finding of the requisite competitive injury. The Seventh Circuit, under date of January 25, 1961, held that the Anheuser-Busch record would not support a finding of competitive injury and set aside the cease and desist order, 289 F. 2d 835. The time for filing certiorari to the Supreme Court from the Seventh Circuit's last opinion has expired and such opinion (reported in 289 F. 2d 835) must be deemed to be the ruling

law at this time. Although Anheuser-Busch involved territorial price discrimination and primary line competition, some of the language of the Seventh Circuit in its last opinion is appropriate to this case in view of this examiner's finding that the evidence in this record will not support a finding of the competitive injury required by the statute. The Seventh Circuit, inter alia, said:

> "It is true that the effects of AB's [Anheuser-Busch's] acts on competition might have been different from what they actually were and that nevertheless it could be held to account under Section 2(a) for what actually happened as well as the reasonable possible effects thereof. But, to prove the *acts* themselves, the Commission was required to adduce evidence of what AB *did* and a finding of a violation cannot rest upon a conjecture as to what it *might do*. Potentiality to commit an act cannot be used as a substitute for proof of the act itself." (Emphasis in original.)

In *General Foods Corp.*, Docket 5675, 50 F. T. C. 885 (1954), in affirming the examiner's decision dismissing a complaint charging violation of § 2(a) for failure of proof of a lessening of competition, the Commission stated (p. 889):

> "The burden of proof to establish injury to competition is on counsel supporting the complaint. In *A. E. Staley Manufacturing Co.* v. *Federal Trade Commission*, 135 F. 2d 453, the court held that proof of discrimination in price is not sufficient; that in addition 'there must be evidence to support a finding and there must be a finding based on that evidence to show wherein competition is substantially lessened and a monopoly fostered.'"

The evidence in this record does not show "wherein competition is substantially lessened and a monopoly fostered" by United's discount schedules. While the General Foods

case involved primary line rather than secondary line discrimination, the Commission expressly disapproved the view expressed by the examiner that the test differed as between those two situations (50 F. T. C. at 887).

Price differentials per se are not prohibited by § 2(a) of the Clayton Act, but only those price differentials having an actual or probable effect on competition. There is a highly respectable and commanding line of opinion to the effect that *Corn Products Refining Company* v. *FTC*, 324 U. S. 726 (1945); *Morton Salt Company* v. *FTC*, 334 U. S. 437 (1948); and *P. Sorenson Mfg. Co.*, 52 F. T. C. 1659, aff'd per curiam, *P. Sorenson Mfg. Co.* v. *FTC*, 246 F. 2d 687 (D. C. Cir. 1957) lead but to one conclusion, namely, that price discrimination among competing customers of the seller carries with it a conclusion of competitive injury per se (See Docket No. 7225, *Tri-Valley Packing Assn.*, opinion dated August 1, 1961, page 18) and that this per se principle is especially applicable in a highly competitive business such as the grocery business here involved. With all due respect to this high authority, this examiner respectfully suggests that if the Congress had intended price discrimination among competing customers of the seller to constitute per se violation under § 2 (a) it would have phrased §2(a) accordingly to give effect to that intent. In a footnote in *Sun Oil Co.* v. *FTC*, ... F.2d....; 30 L. W. 2060, 8/1/61 (July 24, 1961, C. A. 5), the court quotes authorities to the effect that the virtue of the Robinson-Patman Act may, like Roman law, "lay in its being neither too plain nor too obscure, but expressed in a sort of middling obscurity." The Seventh Circuit's Second Opinion in Anheuser-Busch, supra, quoted, negates the notion that proof of competitive injury under § 2(a) may be found in such "middling obscurity." It cannot be based upon speculation and conjecture.

Section 2(a) requires that the effect on competition be substantial. As the court stated in *Whitaker Cable Corp.*

v. *Federal Trade Commission*, 239 F. 2d 253 (C. A. 7th 1956), at 256:

> "Congress has not outlawed price differentials per se, unjustified though they may be. The Act was not intended to reach every remote, adverse effect on competition. The effect must be substantial. * * * If the amount of the discrimination is inconsequential or if the size of the discriminator is such that it strains credulity to find the requisite adverse effect on competition, the Commission is powerless under the Act to prohibit such discriminations whether first or second line competition be involved."

The Commission's cease and desist order was affirmed by the court in Whitaker.

A cumulative quantity discount was also involved in *Yale & Towne Mfg. Co.*, Docket No. 6232, 52 F. T. C. 1580 (1956), where the Commission affirmed the examiner's decision dismissing the complaint at the close of the case-in-chief. Although primary line competition was involved, the considerations on which the decision was based are pertinent here. In that case, which involved the sale of industrial trucks, it was not disputed that the discounts granted were substantial and that they resulted in lower net acquisition costs to some of respondent's customers. The Commission concluded, however, that the evidence was insufficient to show that price was a paramount factor in influencing sales. And in reply to the contention of the appellant that the Act does not require actual injury to competition, but only a reasonable probability of such injury, the Commission stated (52 F. T. C. at 1604):

> "This latter concept, which is sound, does not support the proposition, however, that conclusive inferences may be drawn from isolated evidentiary facets of the case without consideration of those which may be drawn from the entire record. If the particular circumstances attending the discriminations refute

conclusions that the proscribed adverse effects may result, the statutory requirements of proof of injury have not been met. The proponent of the complaint has the burden of meeting these standards in proving competitive injury; and, where the burden has not been sustained in the course of the case-in-chief by counsel supporting the complaint, the proceeding should be dismissed."

In the Matter of *Fred Bronner Corporation,* Docket 7068, the Federal Trade Commission, on September 29, 1960, sustained the hearing examiner's dismissal of a complaint under § 2(a). In Bronner the Commission gives a definitive opinion of the implications of *Federal Trade Commission* v. *Morton Salt Company,* 334 U. S. 37 (1948); and Whitaker, holding, as to Morton Salt:

". . . The Court ruled that this competitive handicap could not be minimized by reason of the fact that salt is only a small item in the non-favored purchasers' businesses. In effect, the court held that it was not necessary for the Commission to consider sales in other merchandise categories in determining injury to the purchaser victimized by respondent's price differential. *The contention of counsel supporting the complaint that we project the discount to other merchandise purchased by the favored customers is clearly beyond the holding in the Morton Salt case and must be rejected.*" (Emphasis supplied.)

This hearing examiner's finding in this proceeding of no competitive injury by United's discount schedules is not premised solely on the fact that respondent's products are "only a small item in the non-favored purchasers' businesses." The finding is based upon consideration of all material facts in this record, including the total absence of proof of actual or probable competitive injury to any of the independent store owners who testified as the Commission's witnesses.

In Bronner the Commission cited with approval the quotation reproduced (page 8) from Whitaker. The Commission also held:

> "Regardless of whether the court in the Whitaker case meant the dollar amount or the percentage rate of the discount, it is our view that neither of these factors can be considered separate and apart from the other circumstances of record in determining whether a price discrimination has the proscribed adverse effects. As stated by the court in the Whitaker case, 'Congress has not outlawed price differentials per se, unjustified though they may be.' Either of the aforementioned factors must be viewed in the light of the actual competitive situation surrounding the particular pricing practice charged to be illegal. It is clear that this was done by the court in both the Whitaker and Edelmann [*E. Edelmann & Co.* v. *FTC*, 239 F. 2d 152 (C. A. 7th 1956)] cases. . . ."

In the Edelmann case, the court held (page 155):

> ". . . Although it has been held that there is no automatic de minimis exception in Section 2(a) which requires the Commission to insert a maximum permissible discrimination in its order [citing cases], it is implicit in the Act that discriminations which are negligible and which at best have a remote effect on competition are not within its prohibitions. See our opinion in *Whitaker Cable Co.* v. *Federal Trade Commission*, 7 Cir., 239 F. 2d 253. But it must be remembered that in enacting the Robinson-Patman Act, 49 Stat. 1528 (1936), 15 U. S. C. A. § 13, Congress undertook to strengthen this phase of the Clayton Act which it thought had been too restrictive in practice by directing emphasis to individual competitive situations rather than competition in general. . . ."

In view of the finding by this examiner that counsel supporting the complaint has not, in this record, sustained

the burden of proof of competitive injury imposed upon him by law,

It Is Ordered that Count I of the complaint against respondent United Biscuit Company of America, a corporation, be and it hereby is dismissed.

Leon R. Gross,
Hearing Examiner.

November 6, 1961.

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(2) First Commission Opinion

BEFORE FEDERAL TRADE COMMISSION

• • (Caption—7817) • •

Commissioners:

Paul Rand Dixon, *Chairman*
Sigurd Anderson
William C. Kern
Philip Elman
Everette MacIntyre

OPINION OF THE COMMISSION

By Anderson, Commissioner:

This matter is before the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision as to Count I, filed November 13, 1961, dismissing the complaint as to Count I. The hearing examiner in the aforementioned initial decision sustained the respondent's motion of April 28, 1961, made at the close of the case in chief in support of the complaint, to dismiss Count I, stating that the ground for his action was the failure of the evidence to prove the competitive injury required to be shown under Section 2(a) of the amended Clayton Act.[1]

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[1] The hearing examiner refers to the filing of his initial decision as to Count II, under which decision, subject to Commission review, Count II would be disposed of pursuant to §§ 3.21 and 3.25 of the Commission's Rules of Practice, published May 6, 1955.

Counsel in support of the complaint appeals, averring (1) that the examiner erred in failing specifically to find that respondent discriminated in price between competing customers, and (2) that he erred in failing to find that the price discriminations charged had the adverse effects proscribed by the statute and that a prima facie case had been proved. Said counsel requests that the initial decision be reversed and the case be remanded.

The complaint alleges in part that respondent discriminated in price between different purchasers of its biscuit products of like grade and quality and that such discriminations have been effectuated through the use of respondent's cumulative discount systems based on the dollar volume of the customer's monthly purchases. Respondent's answer does not challenge the fact that its Sawyer Division used in the designated periods the several discount schedules set out in the complaint. These schedules provided graduated discounts up to 6% for varying amounts of monthly purchases. They are as follows:

For the Period July 1, 1958, to June 30, 1959:

Monthly Purchases	Discount
$ 00.00 to $ 24.99	0%
25.00 to 39.99	2%
40.00 to 69.99	3%
70.00 to 99.99	4%
100.00 to 124.99	5%
125.00 and over	6%

For the Period July 1, 1959, to Date of Issuance of Complaint March 10, 1960:

Monthly Purchases	Discount
$ 00.00 to $ 24.99	0%
25.00 to 44.99	1½%
45.00 to 59.99	2%
60.00 to 74.99	2½%
75.00 to 89.99	3%
90.00 to 109.99	3½%
110.00 to 129.99	4%
130.00 to 149.99	5%
150.00 and over	6%

In the case of a purchaser with more than one store, such as a corporate chain with multiple retail outlets, the discount to such purchaser under these schedules was calculated on the basis of the aggregated purchases of all the stores operated by the purchaser. The discounts under these schedules will be referred to hereinafter as "volume" discounts.

The hearing examiner failed to make a specific finding that, as a result of such volume discounts, some customers were charged higher prices for like goods than others competing with such customers and that this constituted price discrimination under Section 2(a) of the amended Clayton Act. However, he clearly assumed such to be the fact; otherwise he would not have reached the injury question.

The present record amply supports a finding that respondent did discriminate in price as charged.[2] The evidence, while not limited to a single division of respondent, largely concerns the Sawyer Biscuit Company Division of United Biscuit Company of America (Sawyer Division), and so the following references are generally to the activities of that division. Sawyer Division's net sales for 1959 amounted to $12,215,665. In January of that year, Sawyer Division sold to 21,773 customers operating 23,664 outlets. It should be noted that the number of customers and outlets varies from month to month. During January 1959, 8,057 Sawyer Division customers earned a volume discount, i.e., the amount was credited to them which they also received at that time or later, and 13,716 neither earned nor received such a discount. Of those receiving volume discounts, many received less than 6%. For instance, in January 1959, retail grocery customers of re-

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[2] A price discrimination within the meaning of the phrase "discriminate in price" in Section 2(a) is merely a price difference. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 549 (1960).

spondent earned and, either then or later, received volume discount payments as follows:

3,718 customers	2%
2,287 customers	3%
704 customers	4%
310 customers	5%
1,038 customers	6%

Certain of the customers receiving no volume discount or less than 6% discount were in competition with one or more customers receiving the full 6%. These favored customers included chain store organizations such as The Kroger Company (Kroger), The Great Atlantic & Pacific Tea Co. (A & P), and National Food Stores (National).[3]

The evidence of record includes a showing as to price discriminations between and among competing customers in the trading areas of Gary, Indiana; South Bend, Indiana; and Burlington, Wisconsin. Specific examples for two of the areas will be discussed below.

In Gary, Indiana, one customer paying a higher price for respondent's products was Wally's Fifth Avenue Mart. The record shows that Wally's earned, i.e., it was credited with and then or later received, the following volume dis-

[3] Counsel supporting the complaint has included with his brief an appendix showing a comparison of purchase volumes and discounts of individual chain stores and independent grocery stores. Respondent apparently does not contest the accuracy of the figures in the appendix although it does contend that the schedule is not complete.

The record shows that of the 43 chain group purchasers listed in Commission Exhibit 120-A, including Kroger, A & P and National, all received 6% volume discounts for 1959 purchases except that for certain months—January, April, May, August, November and December—one corporate chain, not identified, did not receive the full 6% discount. Accordingly, the record will sustain a finding that, for 1959 purchases, all chains so listed in the months other than those mentioned received 6%; for the remaining months all chains so listed other than one received the 6%.

counts in various months in 1959: 3.0% in January and February, 2.0% in March, 0% in October, 1.5% in November, and 2.0% in December. There is no specific evidence as to the other months of 1959, although the owner of the store, Walter Pall, testified, in effect, that Wally's earned only low volume discounts. Other stores in Gary, Indiana, receiving discounts under 6% included Better Foods, Inc. (e.g., 1.5%, earned October 1959), Gene's Super Market (e.g., 3.5%, earned December 1959), and Tobe's Super Market (e.g., 3.5% earned November 1959). These stores were each competing with one or more of respondent's customers receiving 6% discounts for purchases made at the same time, which favored customers included Kroger and A & P.

In South Bend, Indiana, in 1959, certain independent store customers of the respondent failed to earn any volume discounts or earned and received discounts of less than 6%. Such customers and the volume discounts earned in January 1959, if any, included the following:

Horvath's Self Service	3%
Vince's Super Saver	3%
Food Center	2%
A & J Market	0%
K & F Food Market	4%

Those who earned also received payments. Discounts under 6% or no discounts are also shown for other months in 1959 for these customers. Each competed with one or more customers of respondent receiving 6% volume discounts for purchases made at the same time, which favored customers included Kroger and National.

In many instances, the grocery stores receiving the smaller discounts purchased more goods from respondent in a particular month than did the individual competing chain store outlet receiving 6%. For example, in October 1959, Gene's Super Market in Gary, Indiana, received a 2½% volume discount on biscuit purchases from respondent of $66.63, while A & P received a 6% volume discount on

smaller purchases of $26.28 delivered to one of its outlets competing with Gene's. Another example, in October 1959, Food Center in South Bend, Indiana, received no discount on biscuit purchases from respondent of $24.05, while National received a 6% discount on purchases of $3.00 delivered to National Store #44 competing with Food Center. This inequality in payments was due to the fact that the chains were given volume discounts based on the aggregated purchases of their multiple outlets.

As a result of the aforementioned differences in volume discounts, respondent charged some customers a higher price for like goods than it charged a competing customer or competing customers.

The hearing examiner, in his consideration of whether the price discriminations so disclosed resulted in the competitive effect defined in the Act, erred in failing to apply the proper test to make this determination. He first cites *Anheuser-Busch, Inc.* v. *Federal Trade Commission*, 289 F. 2d 835 (7th Cir. 1961), and *General Foods Corp.*, 50 F. T. C. 885 (1954), to support his decision, but in light of the specifically applicable judicial authority to be mentioned hereafter, these cases are not controlling for this proceeding. While the hearing examiner refers to *Corn Products Refining Company, et al.* v. *Federal Trade Commission*, 324 U.S. 726 (1945), and *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37 (1948), as well as *P. Sorensen Mfg. Co. Inc.*, 52 F. T. C. 1659 (1952), *aff'd per curiam, P. Sorensen Mfg. Co., Inc.* v. *Federal Trade Commission*, 246 F. 2d 687 (D.C. Cir. 1957), he does not apply the principles set forth in these cases and, in effect rejects the holdings.

Section 2(a) of the amended Clayton Act does not require a finding that price discriminations have in fact had an adverse effect on competition (there is no need, for instance, to show that a competitor has suffered financial losses or has been forced out of business); it is enough that they may have the prescribed effect. *Federal Trade Com-*

mission v. *Morton Salt Company, supra.* The "gone out of business" test is not a part of Section 2(a). To insist on any such requirement would be contrary to the purposes and intention of Congress in passing this legislation. A showing in the *Morton Salt* case that certain merchants had to pay the respondent therein substantially more for like goods than their competitors justified a finding of competitive injury within the meaning of the Act. In *Moog Industries, Inc.* v. *Federal Trade Commission,* 238 F. 2d 43 (8th Cir. 1956), the court in considering the question of injury to competition held in part as follows:

> "With competition so keen, margins so small and over-all net profits so low, it was clearly open to the Commission to find that rebates denied to some purchasers (well more than half in all lines) but granted to others, ranging up to 19%, may probably result in substantial injury to competition." (Id. 51.)

See also *E. Edelmann & Co.* v. *Federal Trade Commission,* 239 F. 2d 152 (7th Cir. 1956); *Whitaker Cable Corp.* v. *Federal Trade Commission,* 239 F. 2d 253 (7th Cir. 1956); *Standard Motor Products, Inc.* v. *Federal Trade Commission,* 265 F. 2d 674 (2nd Cir. 1959); *P. Sorensen Mfg. Co., Inc.* v. *Federal Trade Commission, supra.* Recently in *Tri-Valley Packing Association,* Docket Nos. 7225 and 7496 (1962), we held that in any case involving the effect of a price discrimination on competition between buyers the requisite injury may be inferred from a showing that a purchaser paid substantially less than its competitor for goods of like grade and quality sold by the respondent and that the question of substantiality must be determined from the facts in each case.

Fred Bronner Corporation, et al., Docket No. 7068 (1960), a Section 2(a) matter dismissed by the Commission for lack of a showing of competitive injury, differs from the secondary line injury cases cited above because the evidence in that matter was not such as to warrant a finding

that the price differential was substantial or competitively significant in the market.

Clearly, the test for competitive injury set forth in *Morton Salt* and applied in the automotive cases above mentioned should govern this proceeding.

We turn now to the facts shown in the present record. The majority of respondent's customers received no volume discount. Independent store owners testified generally as to the highly competitive nature of the retail food business. Net profits are low and cash discounts and other allowances are important. One store owner witness testified: ". . . we have to fight not only for pennies but for fractions." There are a number of examples of low net profits shown in the record, such as 2%, 3 to 5% and 4 to 5%. A number of independent store witnesses testified that price was a very important, if not the most important, factor in enabling them to compete. There is testimony from such witnesses to the effect that if they could buy cheaper they could sell for less, and that customers will, in the over-all picture, buy where the prices are lower. Considering the highly competitive nature of the market and the other factors mentioned, a volume discount of 6%, tantamount to a difference in price of 6%, was clearly substantial. Likewise substantial were the lesser discounts shown ranging up to 6%.

On the basis of these facts, there is in the present record sufficient evidence to find that the competitive opportunities of certain purchasers were injured when they had to pay respondent substantially more than their competitors had to pay and that the effect may be substantially to injure, destroy or prevent competition with the purchasers receiving the benefit of such discriminations. We believe that the examiner's failure to so find was clearly erroneous. Unless the showing in the record is rebutted or justified, the evidence is sufficient to support an order against respondent to cease and desist the price discrimination practice charged.

The appeal of counsel supporting the complaint is granted. It is directed that the initial decision as to Count I be vacated and set aside and that the matter be remanded to the hearing examiner for further proceedings in conformity with the views herein expressed. An appropriate order will be entered.

Commissioner Elman concurred in the result of the decision of this matter.

June 28, 1962.

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(3) Second Initial Decision

BEFORE FEDERAL TRADE COMMISSION

* * (Caption—7817) * *

INITIAL DECISION UPON REMAND AS TO COUNT I.

Leon R. Gross, Hearing Examiner.

Ross, McGowan & O'Keefe, by Roland D. Whitman, Esq., of Chicago, Illinois, for Respondent.

Brockman Horne, Esq., for the Commission.

Preliminary Statement

The complaint which issued in this proceeding on March 10, 1960, alleged in Count I that respondent had violated subsection 2(a) of the Clayton Act, as amended, and, in Count II that respondent has violated subsection 2(d) of that Act, the pertinent parts of which Act read as follows:

> "(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, * * * to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such

discrimination, or with customers of either of them. * * *"

"(d) That it shall be unlawful for any person engaged in commerce, * * * to pay * * * anything of value * * * to a customer of such person * * * in consideration for any services or facilities furnished by or through such customer * * * unless such payment * * * is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

While counsel supporting the complaint (hereinafter designated "complaint counsel") was introducing evidence in support of the allegations in Count I, it was represented to the hearing examiner that Count II of the complaint would probably be disposed pursuant to § 3.21 and § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, published May 6, 1955, as amended, by an agreement containing a consent order to cease and desist. Complaint counsel completed the introduction of evidence in support of his case-in-chief as to Count I. On April 23, 1961, respondent moved to dismiss Count I of the complaint, after complaint counsel had rested his case, on the grounds, among others, that complaint counsel's proof failed to establish the competitive injury or likelihood of competitive injury required to be shown.

On July 26, 1961, the hearing examiner issued an initial decision as to Count I granting respondent's motion to dismiss these proceedings on the grounds that the record did not at that time contain that degree of proof of competitive injury, or likelihood of competitive injury, required under the Statute.

In his July 26, 1961, initial decision as to Count I, the hearing examiner noted that counsel had informed him that they were taking steps to dispose of Count II by entering into an agreement containing a consent order to

cease and desist, and the examiner directed counsel to present such agreement to the examiner as provided by § 3.21 and §.3.25 of the Rules as promptly as possible.

On August 23, 1961, counsel for the parties filed with the Secretary of the Federal Trade Commission a notice of their intention to dispose of Count II of this complaint by signing an agreement containing a consent order to cease and desist.

On August 30, 1961, the Federal Trade Commission vacated and set aside the initial decision of July 26, 1961, as to Count I on procedural grounds. On November 6, 1961, this examiner issued two separate initial decisions. The initial decision as to Count I was in substantially the same language as the prior decision of July 26, and granted respondent's motion to dismiss the alleged violations of § 2(a); the initial decision as to the § 2(d) violations alleged in Count II of the complaint contained a cease and desist order.

On December 11, 1961, the Commission suspended the effective date of the initial decision as to Count II, until further order of the Commission.

On June 28, 1962, the Commission issued an order vacating the initial decision as to Count I and remanded the matter for further proceedings.

On October 1, 1962, a hearing on remand was convened in Washington, D. C., and both parties declined to introduce additional evidence at such hearing. The parties represented that they would not file proposed findings and conclusions as provided by Rule 4.17 but reserved their respective rights to present a form of appropriate order. Such suggested orders have been filed. The parties have fully reserved their respective rights of appeal from any order as may be herein entered.

The posture of the record at this time is that the parties have been accorded in all respects opportunity for a full hearing, and have completed the introduction of evidence.

Since the hearing examiner issued his November 6, 1961, decision in this case, the Federal Trade Commission has spoken authoritatively in its opinions in *Tri-Valley Packing Association,* Dockets 7225 and 7496, Commission's Opinion dated May 10, 1962; *American Oil Company,* Docket 8183, Commission's Opinion dated June 27, 1962, and its Opinion dated June 28, 1962, remanding this case.

In Tri-Valley, the Commission held (p. 8):

> "• • • In view of our holding that respondent's price discriminations may result in injury to competition regardless of whether there is actual competition in the resale and distribution of the products involved in the discriminations, we believe that the phrase 'in the resale and distribution of respondent's products' unduly limits the scope of the order and should be deleted therefrom."

And on page 5:

> "In any case involving the effect of a price discrimination on competition between buyers, the requisite injury may be inferred from a showing that a purchaser paid substantially less than its competitor for goods of like grade and quality sold by the respondent (*Federal Trade Commission* v. *Morton Salt Company, supra*); and it has been held that such an inference is permissible despite testimony by the nonfavored purchaser that he had not been injured by the discrimination. *Moog Industries, Inc.* v. *Federal Trade Commission,* 238 F. 2d 43 (1956); *E. Edelmann & Co.* v. *Federal Trade Commission,* 239 F. 2d 152 (1956). • • •"

In American Oil, the Commission in its opinion (p. 3) interpreted *Morton Salt Co.* (334 U. S. 37 (1948)) as holding:

> "• • • in price discrimination cases involving competition between buyers, the requisite injury to such

> competition may be inferred from a showing that the seller charged one customer a higher price for like goods than he had charged one or more of the purchaser's competitors and that the amount of this discrimination was substantial. * * *"

And in its opinion in the instant case, the Commission, in commenting on Tri-Valley, inter alia, said (p. 7):

> "* * * we hold that in any case involving the effect of a price discrimination on competition between buyers, the requisite injury may be inferred from a showing that a purchaser paid substantially less than its competitors for goods of like grade and quality sold by the respondent and that the question of substantiality must be determined from the facts in each case. * * *"

Based upon the entire record, the evidence, the exhibits, and admissions in briefs heretofore filed by the parties, the hearing examiner makes the following:

Findings of Fact.

1. Respondent United Biscuit Company of America, a Delaware corporation, whose principal office and place of business is at 25th and West North Avenue, Melrose Park, Illinois, is engaged on a nationwide basis in the manufacture and sale under its own brand name of cookies and crackers (hereinafter called "biscuit products"). For the year ending December 31, 1959, respondent's gross sales were approximately $138,000,000.

2. Respondent's operations are conducted through eight divisions in various geographical areas covering most of the United States. With minor exceptions each division is exclusively responsible for the sale of biscuit products within its respective area; determines its sales policy and pricing practices, and the discounts, if any, which are allowed to respondent's customers who resell at retail its

biscuit products in competition with each other. Respondent does not employ jobbers or distributors, but sells directly to retailers and delivers its products in its own trucks to the retailers.

3. Respondent's retail customers may be classified as (a) "Corporate chains," (b) "voluntary buying chains," (c) "supermarkets," and (d) "independently owned grocery stores." "Corporate chains" usually include multiple-unit retail grocery stores which utilize central buying and control. A "voluntary buying chain" usually refers to individually-owned retail grocery stores which "pool" their purchases in order to utilize central buying facilities without control of the day-to-day operation of the individual store members. "Supermarkets" are, roughly, individually-owned retail grocery concerns which operate more than one retail grocery store; an "independent" is an individually-owned retail grocery concern which usually operates only one retail store.

4. Although the evidence adduced by Commission counsel related chiefly to respondent's Sawyer Division, any violation of § 2(a) of the Clayton Act which is proven in this case against any of the eight divisions will sustain a cease-and-desist order against the corporate respondent. United Biscuit is legally responsible for the pricing practices and policies of each and all of its divisions. Its divisions are not separate corporate or legal entities, but are integrated parts of its overall operation.

5. Respondent manufactures, sells and distributes its biscuit products to retail grocery concerns and restaurants located throughout most of the states of the United States including specifically Indiana and Wisconsin, and transports said biscuit products across state boundaries between respondent and its customers.

6. Respondent is engaged in commerce as "commerce" is defined in the Clayton Act, and, in the course and conduct

of its business in commerce respondent is, and for several years last past has been, in competition with other business concerns which manufacture and sell biscuit products in the same manner as, or in a manner similar to, that of respondent.

7. Respondent's Sawyer Division operates generally in an area composed of the State of Illinois, and portions of Indiana, Kentucky, Missouri, Iowa, Wisconsin, and Michigan. Within the division there are in excess of 20,000 retail grocery customers.

8. From July 1, 1958 to June 30, 1959, respondent's Sawyer Division granted its customers cumulative volume discounts based upon the dollar volume of the customer's monthly purchases. These schedules provided graduated discounts up to six percent for varying amounts of monthly purchases. Such schedules are:

For the period July 1, 1958, to June 30, 1959:

Monthly Purchases	Discount
$ 00.00 to $ 24.99	0%
25.00 to 39.99	2%
40.00 to 69.99	3%
70.00 to 99.99	4%
100.00 to 124.99	5%
125.00 and over	6%

For the Period July 1, 1959, to Date of Issuance of Complaint March 10, 1960:

Monthly Purchases	Discount
$ 00.00 to $ 24.99	0%
25.00 to 44.99	1½%
45.00 to 59.99	2%
60.00 to 74.99	2½%
75.00 to 89.99	3%
90.00 to 109.99	3½%
110.00 to 124.99	4%
130.00 to 149.99	5%
150.00 and over	6%

An independent grocery-store owner is allowed a discount based upon the total of his store or stores' purchases of respondent's biscuit products for a particular month. In the case of a customer making individual monthly purchases of less than $500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are $500 or more, without regard to the amount of the customer's own monthly purchases. Corporate chains such as the Kroger Company and the Great Atlantic & Pacific Tea Company, which operate multiple units but have one common corporate ownership, have their purchases aggregated by area, and the discount is paid to the corporate chain's headquarters which operationally conducts that chain's business in a particular area.

9. Sawyer Division's net sales for 1959 amounted to $12,215,665. In January of that year Sawyer sold to 21,773 customers, operating 23,664 outlets. The number of customers and outlets, of course, varies from month to month. During January, 1959, 8,057 Sawyer Division customers earned a volume discount; i.e., the amount was credited to them, and they received the discount either at that time or later. In that period, 13,716 Sawyer customers neither earned nor received such a discount. Of the customers receiving volume discounts, many received less than 6%.

10. In January, 1959, retail grocery customers of respondent earned, and, either then or later, received volume discount payments as follows:

3,718	customers	2%
2,287	"	3%
704	"	4%
310	"	5%
1,038	"	6%

Certain of the customers receiving no volume discount, or less than 6% discount, were in competition with one

or more customers receiving the full 6% discount. The favored customers included, inter alia, chain store organizations such as the Kroger Company, the Great Atlantic & Pacific Tea Company, and National Food Stores.

11. Most of the major retail grocery chain stores with seven or more outlets, purchasing from the Sawyer Division in 1959, and listed on CX 120-A and B, were allowed a 6% volume discount, although the independent stores which competed with the chain stores were allowed a lesser discount.

12. Owners of individually-owned grocery stores, in the cities of Burlington, Wisconsin, and South Bend and Gary, Indiana, who are not members of a buying group nor units of a corporate chain, testified concerning the general operations of their stores, with particular reference to their business relationships and practices with respondent. Such store owners were: In Burlington: Donald Rehberg, Paul Spiegelhoff, John Knutowski, and Robert C. Grossman; in Gary, Indiana: Walter Pall, Jack Landsman, Oscar Noak, and Irving Tobe; in South Bend, Indiana: Dennis Horvath, Earl Walter Plack, Marion Nowicki, and Vincent A. Koziatek. Annual sales for some of these stores were: $1 million, $500,000, $417,000, $360,000, $320,000, $240,000, $125,000, and $120,000.

13. Although the retail dollar sales of respondent's biscuit products constitute a fractional percentage of the overall gross sales of some of the stores whose owners testified, the profit margin for the stores is very small. Some of the witnesses testified, and are uncontradicted in this record, that the net profit margin in the retail grocery business as an industry is low in relation to gross sales. Some of the independent store owners testified generally that they endeavor to keep their biscuit products priced at approximately the same level as their competitors, including chain stores but such chains provide especially strong competition for them, and over-all the retail grocery business is highly competitive.

14. The independent store owners are unable to match the over-all lower prices of the corporate chains on most items. The independents are unable to meet the indirect price reductions implicit in the use and issuance of trading stamps; also, they cannot afford to advertise as extensively as the chains. Several independents testified they do no advertising at all except by signs and posters on their premises. These individual store owners are unable to match the chain stores' expensive plants, air conditioned premises in some instances, ample parking lots, larger and more attractive display areas, and other features, which cause the chains to be more attractive to customers and to provide more comfortable places to shop. If the chain stores stay open for the same number of hours as the independents, such advantages as the independents might have enjoyed by staying open longer hours also cease to exist.

15. Many complex factors enter into the ability of an independent grocery-store operator to compete successfully with the corporate chains and the members of the buying groups. One store owner testified: "We have to fight not only for pennies but for fractions." Independent store witnesses testified that the price at which they purchase their merchandise is a very important, if not the most important, factor in determining whether they are able to compete.

16. Although the dollar differences in the amount of the dollar discounts paid to the independents as against the chains and buying groups may not be substantial, the percentage differences in the amount of discount received, and, therefore, initial cost to the independent store owner, may be substantial.

17. A comparison of purchase volumes and discounts of individual chain stores with purchase volumes and discounts of independent grocery stores made by complaint counsel in Appendix A to his brief, and unchallenged by respondent, shows the following:

COMPARISON OF PURCHASE VOLUMES AND DISCOUNTS OF INDIVIDUAL CHAIN STORES WITH PURCHASE VOLUMES AND DISCOUNTS OF INDEPENDENT GROCERY STORES.

Commission Exhibit Number	Purchaser	Location	Date	Purchases	Greater Purchases in terms of dollar amount	Discount	Greater Discounts in terms of percentage
25-K	Kroger Company 628	Gary, Ind.	Jan. 1959	$ 43.42	$	6.0%	100.0%
25-D	Wally's Fifth Avenue Mart	Gary, Ind.	Jan. 1959	45.37	1.95	3.0	
39-K	Kroger Company 628	Gary, Ind.	Feb. 1959	47.28	4.07	6.0	100.0
39-D	Wally's Fifth Avenue Mart	Gary, Ind.	Feb. 1959	43.21		3.0	
99-A	A & P	Gary, Ind.	Oct. 1959	26.28		6.0	300.0
99-E	Better Foods	Gary, Ind.	Oct. 1959	28.35	2.07	1.5	
99-A	A & P	Gary, Ind.	Oct. 1959	26.28		6.0	140.0
99-B	Gene's Certified Supermart	Gary, Ind.	Oct. 1959	66.83	40.55	2.5	
100-A	A & P	Gary, Ind.	Nov. 1959	50.60		6.0	71.4
100-C	Tobe's Super Market	Gary, Ind.	Nov. 1959	99.93	49.33	3.5	
101-A	A & P	Gary, Ind.	Dec. 1959	57.33		6.0	200.0
101-D	Wally's Fifth Avenue Mart	Gary, Ind.	Dec. 1959	58.30	0.97	2.0	
101-A	A & P	Gary, Ind.	Dec. 1959	57.33		6.0	71.4
101-B	Gene's Super Market	Gary, Ind.	Dec. 1959	106.05	48.72	3.5	
100-H	Kroger Company 628	Gary, Ind.	Nov. 1959	0.56		6.0	300.0
100-E	Better Foods	Gary, Ind.	Nov. 1959	25.02	24.46	1.5	
100-H	Kroger Company 628	Gary, Ind.	Nov. 1959	0.56		6.0	71.4
100-C	Tobe's Super Market	Gary, Ind.	Nov. 1959	99.93	99.37	3.5	
100-H	Kroger Company 628	Gary, Ind.	Nov. 1959	10.56		6.0	300.0
100-D	Wally's Fifth Avenue Mart	Gary, Ind.	Nov. 1959	26.64	25.68	1.5	
101-H	Kroger Company 628	Gary, Ind.	Dec. 1959	14.86		6.0	71.4
101-B	Gene's Super Market	Gary, Ind.	Dec. 1959	106.05	91.19	3.5	
101-H	Kroger Company 628	Gary, Ind.	Dec. 1959	14.86		6.0	200.0
101-D	Wally's Fifth Avenue Mart	Gary, Ind.	Dec. 1959	58.30	43.44	2.0	

COMPARISON OF PURCHASE VOLUMES AND DISCOUNTS OF INDIVIDUAL CHAIN STORES WITH PURCHASE VOLUMES AND DISCOUNTS OF INDEPENDENT GROCERY STORES.

Commission Exhibit Number	Purchaser	Location	Date	Purchases	Greater Purchases in terms of dollar amount	Discount	Greater Discounts in terms of percentage
66-L	Kroger Store F 98	So. Bend, Ind.	Jan. 1959	$29.44	$-	6.0%	50.0%
66-B	K & F Food Market	So. Bend, Ind.	Jan. 1959	72.73	43.29	4.0	
66-L	Kroger Store F 98	So. Bend, Ind.	Jan. 1959	29.44		6.0	100.0
66-B	Horvath's Self Service	So. Bend, Ind.	Jan. 1959	68.50	39.06	3.0	
66-L	Kroger Store F 98	So. Bend, Ind.	Jan. 1959	29.44		6.0	100.0
66-B	Vince's Super Saver	So. Bend, Ind.	Jan. 1959	56.08	26.64	3.0	
66-L	Kroger Store F 98	So. Bend, Ind.	Jan. 1959	29.44	0.26	6.0	200.0
66-C	Food Center	So. Bend, Ind.	Jan. 1959	29.18		2.0	
66-L	Kroger Store F 105	So. Bend, Ind.	Jan. 1959	22.08	6.48	6.0	
66-A	A & J Market	So. Bend, Ind.	Jan. 1959	15.60		—0—	
66-L	Kroger Store F 105	So. Bend, Ind.	Jan. 1959	22.08		6.0	50.0
66-B	K & F Market	So. Bend, Ind.	Jan. 1959	72.73	50.65	4.0	
66-L	Kroger Store F 105	So. Bend, Ind.	Jan. 1959	22.08		6.0	100.0
66-B	Horvath's Self Service	So. Bend, Ind.	Jan. 1959	68.50	46.42	3.0	
66-L	Kroger Store F 105	So. Bend, Ind.	Jan. 1959	22.08		6.0	100.0
66-B	Vince's Super Saver	So. Bend, Ind.	Jan. 1959	56.08	34.00	3.0	
66-L	Kroger Store F 105	So. Bend, Ind.	Jan. 1959	22.08		6.0	200.0
66-C	Food Center	So. Bend, Ind.	Jan. 1959	29.18	7.10	2.0	
66-M	National Food Store 44	So. Bend, Ind.	Jan. 1959	27.75		6.0	50.0
66-B	K & F Food Market	So. Bend, Ind.	Jan. 1959	72.73	44.98	4.0	
66-M	National Food Store 44	So. Bend, Ind.	Jan. 1959	27.75		6.0	100.0
66-B	Horvath's Self Service	So. Bend, Ind.	Jan. 1959	68.50	40.75	3.0	
66-M	National Food Store 44	So. Bend, Ind.	Jan. 1959	27.75		6.0	100.0
66-B	Vince's Super Saver	So. Bend, Ind.	Jan. 1959	56.08	28.33	3.0	
66-M	National Food Store 44	So. Bend, Ind.	Jan. 1959	27.75		6.0	200.0
66-C	Food Center	So. Bend, Ind.	Jan. 1959	29.18	1.43	2.0	

COMPARISON OF PURCHASE VOLUMES AND DISCOUNTS OF INDIVIDUAL CHAIN STORES WITH PURCHASE VOLUMES AND DISCOUNTS OF INDEPENDENT GROCERY STORES.

Commission Exhibit Number	Purchaser	Location	Date	Purchases	Greater Purchases in terms of dollar amount	Discount	Greater Discounts in terms of percentage
67-L	Kroger Store F 98	So. Bend, Ind.	Feb. 1959	$33.36	$10.70	6.0%	%
67-A	A & J Market	So. Bend, Ind.	Feb. 1959	22.66		—0—	
67-L	Kroger Store F 98	So. Bend, Ind.	Feb. 1959	33.36		6.0	50.0
67-A	K & F Food Market	So. Bend, Ind.	Feb. 1959	85.12	51.76	4.0	
67-L	Kroger Store F 98	So. Bend, Ind.	Feb. 1959	33.36		6.0	100.0
67-B	Horvath's Self Service	So. Bend, Ind.	Feb. 1959	54.91	21.55	3.0	
67-L	Kroger Store F 98	So. Bend, Ind.	Feb. 1959	33.36		6.0	100.0
67-B	Vince's Super Saver	So. Bend, Ind.	Feb. 1959	41.86	8.50	3.0	
67-L	Kroger Store F 98	So. Bend, Ind.	Feb. 1959	33.36	10.52	6.0	
67-C	Food Center	So. Bend, Ind.	Feb. 1959	22.84		—0—	
67-L	Kroger Store F 105	So. Bend, Ind.	Feb. 1959	20.52		6.0	
67-A	A & J Market	So. Bend, Ind.	Feb. 1959	22.66	2.14	—0—	
67-L	Kroger Store F 105	So. Bend, Ind.	Feb. 1959	20.52		6.0	50.0
67-A	K & F Food Market	So. Bend, Ind.	Feb. 1959	85.12	64.60	4.0	
67-L	Kroger Store F 105	So. Bend, Ind.	Feb. 1959	20.52		6.0	100.0
67-B	Horvath's Self Service	So. Bend, Ind.	Feb. 1959	54.91	34.39	3.0	
67-L	Kroger Store F 105	So. Bend, Ind.	Feb. 1959	20.52		6.0	100.0
67-B	Vince's Super Saver	So. Bend, Ind.	Feb. 1959	41.86	21.34	3.0	
67-L	Kroger Store F 105	So. Bend, Ind.	Feb. 1959	20.52		6.0	
67-C	Food Center	So. Bend, Ind.	Feb. 1959	22.84	2.32	—0—	
67-M	National Food Store 44	So. Bend, Ind.	Feb. 1959	29.11	6.45	6.0	
67-A	A & J Market	So. Bend, Ind.	Feb. 1959	22.66		—0—	
67-M	National Food Store 44	So. Bend, Ind.	Feb. 1959	29.11		6.0	50.0
67-A	K & F Food Market	So. Bend, Ind.	Feb. 1959	85.12	56.01	4.0	
67-M	National Food Store 44	So. Bend, Ind.	Feb. 1959	29.11		6.0	100.0
67-B	Horvath's Self Service	So. Bend, Ind.	Feb. 1959	54.91	25.80	3.0	

COMPARISON OF PURCHASE VOLUMES AND DISCOUNTS OF INDIVIDUAL CHAIN STORES WITH PURCHASE VOLUMES AND DISCOUNTS OF INDEPENDENT GROCERY STORES.

Commission Exhibit Number	Purchaser	Location	Date	Purchases	Greater Purchases in terms of dollar amount	Discount	Greater Discounts in terms of percentage
67-M	National Food Store 44	So. Bend, Ind.	Feb. 1959	$29.11	$	6.0%	100.0%
67-B	Vince's Super Saver	So. Bend, Ind.	Feb. 1959	41.86	12.75	3.0	
67-M	National Food Store 44	So. Bend, Ind.	Feb. 1959	29.11	6.27	6.0	
67-C	Food Center	So. Bend, Ind.	Feb. 1959	22.84		—	
68-L	Kroger Store F 98	So. Bend, Ind.	Mar. 1959	25.78		6.0	100.0
68-B	Horvath's Self Service	So. Bend, Ind.	Mar. 1959	56.09	30.31	3.0	
68-L	Kroger Store F 98	So. Bend, Ind.	Mar. 1959	25.78		6.0	200.0
68-B	Vince's Super Saver	So. Bend, Ind.	Mar. 1959	35.41	9.63	2.0	
68-L	Kroger Store F 98	So. Bend, Ind.	Mar. 1959	25.78	4.44	6.0	
68-C	Food Center	So. Bend, Ind.	Mar. 1959	21.34		—0—	
68-L	Kroger Store F 105	So. Bend, Ind.	Mar. 1959	30.21		6.0	100.0
68-B	Horvath's Self Service	So. Bend, Ind.	Mar. 1959	56.09	25.88	3.0	
68-L	Kroger Store F 105	So. Bend, Ind.	Mar. 1959	30.21		6.0	200.0
68-B	Vince's Super Saver	So. Bend, Ind.	Mar. 1959	35.41	5.20	2.0	
68-L	Kroger Store F 105	So. Bend, Ind.	Mar. 1959	30.21	8.87	6.0	
68-C	Food Center	So. Bend, Ind.	Mar. 1959	21.34		—	
68-M	National Food Store 44	So. Bend, Ind.	Mar. 1959	33.87		6.0	100.0
68-B	Horvath's Self Service	So. Bend, Ind.	Mar. 1959	56.09	22.22	3.0	
68-M	National Food Store 44	So. Bend, Ind.	Mar. 1959	33.87		6.0	200.0
68-B	Vince's Super Saver	So. Bend, Ind.	Mar. 1959	35.41	1.54	2.0	
68-M	National Food Store 44	So. Bend, Ind.	Mar. 1959	33.87	12.53	6.0	
68-C	Food Center	So. Bend, Ind.	Mar. 1959	21.34		—	

COMPARISON OF PURCHASE VOLUMES AND DISCOUNTS OF INDIVIDUAL CHAIN STORES WITH PURCHASE VOLUMES AND DISCOUNTS OF INDEPENDENT GROCERY STORES.

Commission Exhibit Number	Purchaser	Location	Date	Purchases	Greater Purchases in terms of dollar amount	Discount	Greater Discounts in terms of percentage
106-D	Kroger Store F 98	So. Bend, Ind.	Oct. 1959	$49.70	$ 3.56	6.0%	200.0%
106-A	K & F Food Market	So. Bend, Ind.	Oct. 1959	46.14		2.0	
106-D	Kroger Store F 98	So. Bend, Ind.	Oct. 1959	49.70		6.0	140.0
107-A	Horvath's Self Service	So. Bend, Ind.	Oct. 1959	71.43	21.73	2.5	
106-D	Kroger Store F 98	So. Bend, Ind.	Oct. 1959	49.70		6.0	200.0
106-A	Vince's Super Saver	So. Bend, Ind.	Oct. 1959	52.63	2.93	2.0	
106-D	Kroger Store F 105	So. Bend, Ind.	Oct. 1959	47.98	1.84	6.0	200.0
106-A	K & F Food Market	So. Bend, Ind.	Oct. 1959	46.14		2.0	
106-D	Kroger Store F 105	So. Bend, Ind.	Oct. 1959	47.98		6.0	140.0
107-A	Horvath's Self Service	So. Bend, Ind.	Oct. 1959	71.43	23.45	2.5	
106-D	Kroger Store F 105	So. Bend, Ind.	Oct. 1959	47.98		6.0	200.0
106-A	Vince's Super Saver	So. Bend, Ind.	Oct. 1959	52.63	4.65	2.0	
106-D	National Food Store 44	So. Bend, Ind.	Oct. 1959	3.00		6.0	
106-A	A & J Market	So. Bend, Ind.	Oct. 1959	18.45	15.45	—	
106-D	National Food Store 44	So. Bend, Ind.	Oct. 1959	3.00		6.0	200.0
106-A	K & F Food Market	So. Bend, Ind.	Oct. 1959	46.14	43.14	2.0	
106-D	National Food Store 44	So. Bend, Ind.	Oct. 1959	3.00		6.0	140.0
107-A	Horvath's Self Service	So. Bend, Ind.	Oct. 1959	71.43	68.43	2.5	
106-D	National Food Store 44	So. Bend, Ind.	Oct. 1959	3.00		6.0	200.0
106-A	Vince's Super Saver	So. Bend, Ind.	Oct. 1959	52.63	49.63	2.0	
106-D	National Food Store 44	So. Bend, Ind.	Oct. 1959	3.00		6.0	
106-B	Food Center	So. Bend, Ind.	Oct. 1959	24.05	21.05	—	

COMPARISON OF PURCHASE VOLUMES AND DISCOUNTS OF INDIVIDUAL CHAIN STORES WITH PURCHASE VOLUMES AND DISCOUNTS OF INDEPENDENT GROCERY STORES.

Commission Exhibit Number	Purchaser	Location	Date	Purchases	Greater Purchases in terms of dollar amount	Discount	Greater Discounts in terms of percentage
108-D	Kroger Store F 105	So. Bend, Ind.	Nov. 1959	$39.00	$	6.0%	300.0%
108-A	K & F Market	So. Bend, Ind.	Nov. 1959	41.09	2.09	1.5	
108-D	Kroger Store F 105	So. Bend, Ind.	Nov. 1959	39.00	4.15	6.0	300.0
109-A	Horvath's Self Service	So. Bend, Ind.	Nov. 1959	34.85		1.5	
108-D	Kroger Store F 105	So. Bend, Ind.	Nov. 1959	39.00		6.0	200.0
108-A	Vince's Super Saver	So. Bend, Ind.	Nov. 1959	58.06	19.06	2.0	
110-C	Kroger Store F 105	So. Bend, Ind.	Dec. 1959	47.59		6.0	140.0
110-A	K & F Food Market	So. Bend, Ind.	Dec. 1959	63.90	16.31	2.5	
110-C	Kroger Store F 105	So. Bend, Ind.	Dec. 1959	47.59		6.0	140.0
111-A	Horvath's Self Service	So. Bend, Ind.	Dec. 1959	67.65	20.06	2.5	
110-C	Kroger Store F 105	So. Bend, Ind.	Dec. 1959	47.59		6.0	100.0
110-A	Vince's Super Saver	So. Bend, Ind.	Dec. 1959	77.40	29.81	3.0	
77-A	A & P	Burlington, Wisc.	Jan. 1959	79.93		6.0	50.0
77-A	Grossman Foods	Burlington, Wisc.	Jan. 1959	84.43	4.50	4.0	
77-A	A & P	Burlington, Wisc.	Jan. 1959	79.93		6.0	50.0
77-A	Hillside Grocery Co.	Burlington, Wisc.	Jan. 1959	90.36	10.43	4.0	

COMPARISON OF PURCHASE VOLUMES AND DISCOUNTS OF INDIVIDUAL CHAIN STORES WITH PURCHASE VOLUMES AND DISCOUNTS OF INDEPENDENT GROCERY STORES.

Commission Exhibit Number	Purchaser	Location	Date	Purchases	Greater Purchases in terms of dollar amount	Discount	Greater Discounts in terms of percentage
86-A	A & P	Burlington, Wisc.	Feb. 1959	$ 77.31	$ 7.64	6.0%	100.0%
86-A	Grossman Foods	Burlington, Wisc.	Feb. 1959	69.67		3.0	
86-A	A & P	Burlington, Wisc.	Feb. 1959	77.31		6.0	50.0
86-A	Hillside Grocery Co.	Burlington, Wisc.	Feb. 1959	94.48	17.17	4.0	
87-A	A & P	Burlington, Wisc.	Mar. 1959	79.06	28.45	6.0	100.0
87-A	Grossman Foods	Burlington, Wisc.	Mar. 1959	50.61		3.0	
87-A	A & P	Burlington, Wisc.	Mar. 1959	79.06		6.0	50.0
87-A	Hillside Grocery Co.	Burlington, Wisc.	Mar. 1959	95.81	16.75	4.0	
88-A	A & P	Burlington, Wisc.	Oct. 1959	72.06		6.0	71.4
88-A	Grossman Foods	Burlington, Wisc.	Oct. 1959	100.99	28.93	3.5	
88-A	A & P	Burlington, Wisc.	Oct. 1959	72.06		6.0	50.0
88-A	Hillside Grocery Co.	Burlington, Wisc.	Oct. 1959	124.03	51.97	4.0	
89-A	A & P	Burlington, Wisc.	Nov. 1959	75.53	7.55	6.0	140.0
89-A	Grossman Foods	Burlington, Wisc.	Nov. 1959	67.98		2.5	
89-A	A & P	Burlington, Wisc.	Nov. 1959	75.53	46.78	6.0	50.0
89-A	Hillside Grocery Co.	Burlington, Wisc.	Nov. 1959	122.31		4.0	
89-A	A & P	Burlington, Wisc.	Nov. 1959	75.53		6.0	71.4
89-A	Spiegelhoff Super Market	Burlington, Wisc.	Nov. 1959	105.97	30.44	3.5	
90-A	A & P	Burlington, Wisc.	Dec. 1959	67.32		6.0	71.4
90-A	Hillside Grocery Co.	Burlington, Wisc.	Dec. 1959	96.99	29.67	3.5	
90-A	A & P	Burlington, Wisc.	Dec. 1959	67.32		6.0	50.0
90-A	Spiegelhoff Super Market	Burlington, Wisc.	Dec. 1959	111.42	44.10	4.0	

18. As a result of the respondent's volume discounts, hereinabove described, some of the respondent's customers were charged higher net prices for respondent's goods of like grade and quality than were other of respondent's customers, competing with such unfavored customers. This constitutes a price discrimination under § 2(a) of the amended Clayton Act. (*F. T. C.* v. *Anheuser Busch, Inc.*, 366 U. S. 536 (1960).)

19. In Gary, Indiana, Wally's Fifth Avenue Mart earned, was credited with, and either then or later received, the following volume discounts in various months of 1959: 3.0% in January and February; 2.0% in March; 0% in October; 1.5% in November and 2% in December. Although there is no specific evidence as to the other months of 1959, Walter Pall, the store's owner, testified, in effect, that Wally's earned only lower volume discounts. Other stores in Gary receiving discounts under 6% included: Better Foods, Inc., Gene's Supermarket, and Toby's Supermarket. These stores were each competing with one or more of respondent's customers receiving 6% discount for purchases made at the same time. These favored customers included Kroger and A & P.

20. In South Bend, Indiana, in 1959, certain independent store customers of the respondent failed to earn any volume discounts or earned and received discounts of less than 6%. Such customers and the volume discounts earned in January, 1959, if any, included the following:

Horvath's Self Service	3%
Vince's Super Saver	3%
Food Center	2%
A & J Market	0%
K & F Food Market	4%

Those who earned the discounts received the payments indicated. The evidence proves discounts under 6%, or no discounts, were given in 1959 to some or all of these cus-

tomers. Each competed with one or more customers of respondent receiving 6% volume discounts for purchases made at the same time. These favored customers included Kroger and National.

21. In many instances, the grocery stores receiving the smaller discounts purchased more goods from respondent in a particular month than did the individual competing chain store outlet receiving 6%. For example, in October 1959, Gene's Supermarket in Gary, Indiana, received a 2½% volume discount on biscuit purchases from respondent of $66.63, while A & P received a 6% volume discount on smaller purchases of $26.28 delivered to one of its outlets competing with Gene's. As another example, in October 1959, Food Center in South Bend, Indiana, received no discount on biscuit purchases from respondent of $24.05, while National received a 6% discount on purchases of $3 delivered to National Store #44 competing with Food Center. This inequality in payments was due to the fact that the chains were given volume discounts based on the aggregated purchases of their multiple outlets.

22. As a result, *inter alia,* of the aforementioned differences in volume discounts allowed to its customers, respondent charged some of its customers a higher net price for goods of like grade and quality than it charged a competing customer or customers. Thereby the competitive ability of the non-favored customers was injured or destroyed.

23. A preponderance of the reliable, probative and substantial evidence in the record proves, and the hearing examiner hereby finds, that respondent, by engaging in the acts and practices hereinabove described and set forth, has discriminated in price between different purchasers of its commodities of like grade and quality, and the effect thereof may be substantially to lessen competition, tend to create a monopoly, and to injure, destroy and prevent competition between its customers in violation of § 2(a) of the Clayton Act, as amended.

24. The hearing examiner further finds that such price discrimination by respondent was not made in good faith to meet an equally low price of a competitor. The hearing examiner therefore reaches the following:

Conclusions.

The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding, and this proceeding is in the public interest.

In the manufacture and sale of its biscuit products, respondent, United Biscuit Company of America, is engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

In the manufacture and sale of its biscuit products in commerce, respondent, by means of the acts and practices hereinabove found, and by means of its discount schedules, and other acts related above, has discriminated in price between different purchasers of its products of like grade and quality by selling its said products to some of its customers at lower prices than it sells like products to other of its customers competing with the favored customers in the retail sale of such products. Such acts and practices constitute price discrimination in violation of § 2(a) of the Clayton Act, as amended.

The effect of such price discrimination may be substantially to lessen competition, tend to create a monopoly, and to injure, destroy, and prevent competition in violation of § 2(a) of the Clayton Act, as amended.

Now, therefore,

It Is Ordered that United Biscuit Company of America, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale and distribution of their products, including cookies and crackers, in commerce, as

"commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price.

LEON R. GROSS,
Hearing Examiner.

November 9, 1962.

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(4) Second Commission Opinion

BEFORE FEDERAL TRADE COMMISSION

• • (Caption—7817) • •

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

OPINION OF THE COMMISSION.

By ANDERSON, *Commissioner:*

This matter is before us upon the exceptions of respondent to the hearing examiner's initial decision as to Count I of the complaint, filed November 9, 1962, holding respondent in violation of Section 2(a) of the Clayton Act, as amended, and ordering it to cease and desist from discriminations in price.[1]

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[1] The hearing examiner filed his initial decision as to Count II of the complaint on November 13, 1961, which is an initial decision based on an agreement containing a consent order to cease and desist. The Commission stayed the effective date of this decision on December 7, 1961. The initial decision as to Count II will be adopted as the decision of the Commission by an order to be issued simultaneously with the order disposing of this proceeding as to Count I of the complaint.

The Commission, on June 28, 1962, vacated a prior initial decision as to Count I, filed November 13, 1961, and remanded the matter to the hearing examiner for further proceedings in conformity with the views expressed by the Commission therein. The Commission held that on the basis of the facts in the record at that time there was sufficient evidence to find that the competitive opportunities of certain purchasers were injured when they had to pay respondent substantially more than their competitors had to pay and that the effect may be substantially to injure, destroy or prevent competition with the purchasers receiving the benefit of such discriminations. The Commission further held that unless such showing is rebutted or justified, the evidence is sufficient to support an order against respondent to cease and desist the discriminations in price charged in the complaint.

No further evidence was presented by either party at the time fixed for hearing on remand, October 1, 1962. The hearing examiner thereafter, on November 9, 1962, filed his initial decision upon remand as to Count I, and it is as to this decision that respondent now files its exceptions.

A brief summary of the facts in this matter follows. Respondent, United Biscuit Company of America, a Delaware corporation with its principal office at 25th and West North Avenue, Melrose Park, Illinois, is engaged on a nationwide basis in the manufacture and sale of cookies and crackers under its own brand name, Respondent's operations are conducted through eight divisions in various geographical areas covering most of the United States. Its net sales in the year ending December 31, 1959, were approximately $138,000,000.

Respondent, through its Sawyer Biscuit Division (Sawyer Division) during the period covered by the complaint, used discount schedules in connection with its sales which provided graduated or "volume" discounts to purchasers

of up to 6 percent for varying amounts of monthly purchases. In the case of a purchaser with more than one store, such as a corporate chain with multiple retail outlets, the discount under these schedules was calculated on the basis of the aggregated purchases of all the stores operated by the purchaser.

Respondent, by reason of the use of the aforementioned discount schedules, discriminated in price between different purchasers of its biscuit products of like grade and quality. The evidence largely concerns the operations of the Sawyer Division which operates generally in the states of Illinois and portions of Indiana, Kentucky, Missouri, Iowa, Wisconsin and Michigan. Sawyer Division's net sales for 1959 amounted to $12,215,665. In January of that year it sold to 21,773 customers operating 23,664 outlets. The number of customers and outlets, however, varies from month to month. During January 1959, 8,057 Sawyer Division customers earned a volume discount, which amount was credited to them and received either at that time or later. In the same month 13,716 Sawyer Division customers neither earned nor received such a discount.

Of the customers receiving volume discounts, many received less than 6 percent. For instance, in January, 1959, retail grocery customers of respondent earned and either then or later received volume discount payments as follows: 3,718 customers—2 percent, 2,287 customers—3 percent, 704 customers—4 percent, 310 customers—5 percent, 1,038 customers—6 percent. Certain of the customers receiving no volume discount or less than 6 percent were in competition with one or more customers receiving the full 6 percent. These favored customers included chain store organizations such as The Kroger Company (Kroger), The Great Atlantic & Pacific Tea Co. (A & P), and National Food Stores (National). With one exception, all of the major retail grocery chain stores with seven or more out-

lets purchasing from the Sawyer Division in 1959, including such stores as Kroger, A & P and National, were allowed a 6 percent volume discount.

The record shows price discriminations between and among competing customers in the trading areas of Gary, Indiana, South Bend, Indiana, and Burlington, Wisconsin. The Gary, Indiana, market will serve as an illustration. There, one customer paying a higher price for respondent's products was Wally's Fifth Avenue Mart. Wally's was credited with the following volume discounts in various months in 1959: 3.0 percent in January and February, 2.0 percent in March, 0 percent in October, 1.5 percent in November, and 2.0 percent in December. In other months that year Wally's apparently earned only low volume discounts. Other stores in Gary, Indiana, receiving discounts under 6 percent included Better Foods, Inc. (e.g., 1.5 percent earned October 1959); Gene's Super Market (e.g., 3.5 percent earned December 1959); and Tobe's Super Market (e.g., 3.5 percent earned November 1959). These stores were each competing with one or more of respondent's customers receiving 6 percent discounts for purchases made at the same time, which favored customers included Kroger and A & P. In many instances, the grocery stores receiving the smaller discounts purchased more goods from respondent in a particular month than did the individual competing chain store outlet receiving the 6 percent. This inequality in payments was due to the fact that the chains were given volume discounts based on the aggregated purchases of their multiple outlets.

As a result of the aforementioned differences in volume discounts, respondent charged some customers a higher price for like goods than it charged a competing customer or competing customers.

Independent store owners testified generally as to the highly competitive nature of the retail food business. Net

profits are low and cash discounts and other allowances are important. One store owner witness testified ". . . we have to fight not only for pennies but for fractions." There are a number of examples of low net profits shown in the record. Certain of the independent store witnesses testified that price was a very important, if not the most important, factor in enabling them to compete. There is also testimony from such witnesses to the effect that if they could buy cheaper they could sell for less and that customers will, in the over-all picture, buy where the prices are lower.

The examiner, in his initial decision as to Count I, filed November 9, 1962, held that, as a result of respondent's price descriminations, the competitive ability of the nonfavored customers was injured or destroyed. He concluded therefore that respondent violated Section 2(a) of the Clayton Act, as amended. This initial decision as to Count I filed November 9, 1962, is the decision before us for review on the appeal of the respondent and it is the "initial decision" hereafter referred to unless otherwise indicated.

Respondent takes exception (1) to certain portions of the initial decision relating to the nature of the price discriminations, (2) to the examiner's findings and conclusions as to competitive injury, (3) to the findings that respondent's price discriminations were not made in good faith to meet the equally low price of a competitor, and, finally, (4) to the scope of the order.

To begin with, respondent objects to the numbered paragraphs 2, 3, and 9, or parts thereof, on the ground that these contain a finding that discount schedules of respondent's Sawyer Division applied to all its retail customers. We do not interpret the paragraphs cited as making any such finding, and therefore reject the exception so made. To avoid any possible question in the matter,

however, we hold that the evidence does not show that the challenged discount schedules were used by any of respondent's divisions except the Sawyer Division.

Respondent next objects to asserted findings in paragraphs numbered 3, 8, and 16 of the initial decision, that customers of respondent's Sawyer Division that are members of voluntary groups pool their purchases from respondent and that they are treated like corporate chains with respect to the aggregation of purchases. Apparently, the main contention here centers around the examiner's statement, in paragraph 8, which reads, "In the case of a customer making individual monthly purchases of less than $500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are $500 or more, without regard to the amount of the customer's own monthly purchases." Such payments were provided for in a schedule adopted July 1, 1960. Complaint counsel takes the position that the evidence in the record does not relate to that more recent schedule, and he urges that the finding contained in the sentence above quoted is not necessary to the decision. Considering all the factors, we conclude that such finding should be stricken. Respondent's exception will be sustained to that extent on this point.

Respondent excepts to the asserted implication, in numbered paragraph 22 and the third paragraph of the conclusions in the initial decision, that it has discriminated in price by acts and practices other than the employment of its volume discount schedules. It contests in effect the use of the term "inter alia" in numbered paragraph 22 and the phrase "and other acts related above" in the third paragraph of the conclusions. Complaint counsel answers that any such finding and conclusion may have had reference to the one percent payment to voluntary group headquarters referred to in the finding quoted in the prior

paragraph. Such finding is to be stricken and there is no other evidence to support the broader holding which the examiner apparently has made and which respondent objects to. Accordingly, the initial decision will be modified by striking the aforementioned words.

An exception is next taken to the finding in numbered paragraph 23 and to the conclusion in the initial decision that the effect of respondent's practices may be to "tend to create a monopoly." Complaint counsel does not oppose dropping this holding from the decision, and since the evidence fails to clearly support a finding and conclusion as to a tendency to monopoly, the initial decision will be amended by striking such references.

Respondent's exception to the hearing examiner's failure to find that the price discriminations consisted only of a favoring of corporate chains against independents by permitting chains to combine purchases is disallowed. The reason is that such was not the basis for the finding of unlawful price discriminations. The combining of the purchases of chain store outlets was a contributing factor, but the real illegality here found was due to the differences in net prices as a result of using volume discount schedules. There is a violation shown with or without the evidence of the combining of chain purchases.

Respondent next objects to the findings on the likelihood of competitive injury. The hearing examiner's findings are made in accordance with the Commission's views as set forth in the decision on remand. We see no reason to disturb them. See also the recent decision in *Muller Co.* v. *Federal Trade Commission,* 323 F. 2d 44 (7th Cir. 1963).

Respondent further excepts to the omission by the examiner of certain findings, namely, those in numbered paragraphs 8, 9, and 11 of his initial decision as to Count I, filed November 13, 1961, asserting that these negate his present conclusion. In these paragraphs the examiner

found, for instance, that sales of respondent's products are a fractional percentage of the gross sales of an independent store, that some of the independent stores might be growing in volume, and that witnesses for some of the independent stores testified they were not injured. Not all of the findings in such paragraphs, including the examples given, would be inconsistent with the holding of a likelihood of competitive injury. Nevertheless, after the examiner had reconsidered the issues in the light of the views expressed by the Commission, he saw fit not to make certain of the same findings appearing in his prior initial decision. We believe that the findings and conclusions he has made in the initial decision now before us are correct except as noted herein and therefore reject respondent's exceptions made on this question.

The examiner finds in numbered paragraph 24 in the initial decision that respondent's price discriminations were not made in good faith to meet an equally low price of a competitor. To this, respondent takes exception claiming that it did not tender evidence in proof of this defense and that the finding therefore is not within the scope of the proceeding. Since there is no basis in the record for this finding, it will be stricken. Nevertheless, respondent has had the opportunity to raise the good faith meeting of competition defense and has not done so; thus, it is foreclosed from again raising such defense on the same or substantially similar facts. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 476-477 (1952).

Respondent lastly challenges the scope of the order. It argues that the order should be limited (1) to biscuit products, (2) to retail grocery customers as purchasers, and (3) to price discriminations between chain stores and independents by means of quantity discounts which aggregate the purchases of chain store outlets. Respondent also contends that the order should not prohibit all price discriminations without regard to the likelihood of adverse

competitive effect. Counsel supporting the complaint opposes all such limitations, except that as to product coverage, and on this question he believes the order should appropriately encompass "food products" rather than the product coverage in the initial decision, which is "their products, including cookies and crackers." Said counsel also asks that the phrase "in resale of such products" be inserted at the end of the order.

We agree with the recommendations of complaint counsel for modification of the initial order. Plainly, the Commission's order should be broad enough to prohibit not only the further use of the precise practice found to have existed in the past but also the future use of related and similar practices. Cf. *Niresk Industries, Inc.* v. *Federal Trade Commission,* 278 F. 2d 337 (7th Cir. 1960), cert. denied, 364 U. S. 883 (1960); *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission,* 311 F. 2d 480 (2d Cir. 1962). The proposal of the respondent would limit the scope of the order to such a degree that it would not even cover the whole of the area of illegality found. The price discriminations disclosed in the record consist of all those resulting from the use of volume discount schedules and not just the price differences where the purchases of multiple chain outlets were combined for the purpose of discounts.

Respondent's objection to the order on the ground that it prohibits price discrimination without regard to whether the discrimination has an adverse effect on competition is rejected because such a qualification has no place in a Commission Section 2(a) order. The likelihood of competitive injury is a fact question for the Commission to determine as a basis for the order, and the Commission cannot shift to the courts a responsibility in enforcement proceedings of trying such issues. *Federal Trade Commission* v. *Morton Salt Company,* 334 U. S. 37, 54 (1948).

In connection with the product coverage of the order, the Commission may frame its order to prohibit the use of the illegal practice in conjunction with respondent's sale of any and all products. *Niresk Industries, Inc.* v. *Federal Trade Commission, supra,* at page 343; *Mueller Co.* v. *Federal Trade Commission, supra; Carter Products, Inc.* v. *Federal Trade Commission,* 323 F. 2d 523 (5th Cir. 1963). The propriety of such an order, however, depends upon the circumstances in the proceeding. *Carter Products, Inc.* v. *Federal Trade Commission, supra, cf. Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission, supra; The Quaker Oats Co.,* Docket No. 8119, decided April 25, 1962.

In the circumstances of this case, we believe a more limited order is appropriate, namely, an order covering "food products." Respondent urges that the order should be limited to biscuit products, i.e., crackers and cookies, but this would so narrow the order that the same practices engaged in as to any other product, even as to closely related products, would not be covered and would require a whole new proceeding to prohibit violations of law. Complaint counsel urges, and respondent does not dispute, that one of respondent's competitors is presently engaged in the sale of potato chips. If such a product is introduced in a competitor's line, it is not improbable that respondent might similarly expand its line. The Commission's order should at least be broad enough to cope with such related products. *Cf. Hershey Chocolate Corp.* v. *Federal Trade Commission,* 121 F. 2d 968, 971-972 (3d Cir. 1941); *Moog Industries, Inc.* v. *Federal Trade Commission,* 238 F. 2d 43, 52-53 (8th Cir. 1956), aff'd, 355 U. S. 411 (1958). An order covering "food products" will be clear and precise as to the products to which it applies and sufficiently comprehensive to cover products related to those for which the violation is found. Yet, it is not so broad as to extend into all possible facets of respondent's business, regardless of the relationship to the practices herein found to be unlawful.

There is an objection by respondent to the inclusion of all purchasers in the order, rather than only retail grocery customers. Respondent, as found by the examiner, sells not only to retail grocery concerns but to restaurants as well. We agree that the qualifying phrase "in the resale of such products" should be added at the end of the order. Thus the order will be limited to customers competing in the resale of respondent's products and will not apply to sales to restaurants for their own use. Respondent's exception to the order on this question is granted to the extent indicated but not otherwise.

The exceptions of the respondent are sustained to the extent above indicated and otherwise rejected. The initial decision will be modified in accordance with the views expressed in this opinion and, as modified, will be adopted as the decision of the Commission. An appropriate order will be entered.

Commissioner Elman concurred in the result and Commissioner Reilly did not participate for the reason he did not hear oral argument.

February 7, 1964.

(5) Final Order of the Commission

BEFORE FEDERAL TRADE COMMISSION

* * (Caption—7817) * *

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

FINAL ORDER AS TO COUNT I.

This matter having come on to be heard upon the exceptions of respondent to the hearing examiner's initial decision upon remand as to Count I, filed November 9, 1962, and upon briefs and oral argument in support of and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having sustained in part and rejected in part the respondent's exceptions, and having directed that the initial decision be modified in accordance with the views therein expressed and as so modified adopted as the decision of the Commission:

It Is Ordered that the sentence in the finding numbered 8 in the initial decision, reading "In the case of a customer making individual monthly purchases of less than $500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are $500 or more, without regard to the amount of the customer's own monthly purchases" be, and it hereby is, striken.

It Is Further Ordered that the term "inter alia" in the first line in the finding numbered 22 in the initial decision be, and it hereby is, stricken.

It Is Further Ordered that the phrase "and other acts related above," in the third and fourth lines of the third paragraph in the Conclusions in the initial decision be, and it hereby is, stricken.

It Is Further Ordered that the phrases "tend to create a monopoly," in the seventh line of the finding numbered 23 and the second line of the fourth paragraph in the Conclusions in the initial decision be, and they hereby are, stricken.

It Is Further Ordered that the first sentence in the finding numbered 24 in the initial decision be, and it hereby is, stricken.

It Is Further Ordered that the order to cease and desist contained in the initial decision be, and it hereby is, modified to read as follows:

> It Is Ordered that the United Biscuit Company of America, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale and distribution of their food products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale of such products.

It Is Further Ordered that the initial decision as modified herein be, and it hereby is, adopted as the decision of the Commission.

It Is Further Ordered that respondent, United Biscuit Company of America, shall, within sixty (60) days after service upon it of this order, file with the Commission a

report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist as set forth in this order.

By the Commission, Commissioner Elman concurring in the result and Commissioner Reilly not participating for the reason he did not hear oral argument.

JOSEPH W. SHEA,
Secretary.

(Seal)

Issued: February 7, 1964.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 888

UNITED BISCUIT COMPANY OF AMERICA, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–15a) is reported at 350 F. 2d 615. The opinion and order of the Federal Trade Commission (R. 42, 110, 112)[1] have not been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1965. On October 25, 1965, Mr. Justice Clark entered an order extending the time for filing a petition for a writ of certiorari to and including December 13, 1965; on December 7, he entered an order granting a further extension to and including

[1] "R." refers to the joint record filed in the court below.

January 7, 1966, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission applied the correct standard in finding that petitioner's continued and systematic price discrimination, whereby some of its customers paid it as much as 6 percent more than others for the same goods, might, in the circumstances of this case, substantially lessen competition.

2. Whether the Commission's cease and desist order, by reason of its breadth and generality, exceeded the bounds of the Commission's discretion to fashion an appropriate remedy.

3. Whether the Commission was required to stay the cease and desist order in this case until it determined that United's two largest competitors were complying with outstanding cease and desist orders similar in terms to the one issued against United.

STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a), provides in pertinent part:

> [I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly, or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce * * * and where the effect of such discrimination may be

substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.

STATEMENT

Petitioner manufactures and sells "biscuit products" (crackers and cookies) throughout the United States (Pet. 57a).[1] Its operations are conducted through eight geographical subdivisions; the evidence in the Commission's proceeding largely concerned one of these, the Sawyer Division.[2] Between July 1, 1958, and June 30, 1959, the Sawyer Division offered retail grocers a graduated monthly discount on biscuit products ranging from 2 percent on a monthly purchase of $25 or more to a maximum 6-percent discount on a monthly purchase of $125 or more (Pet. 18a.).[3] In 1960, the Commission issued a complaint charging United with violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (Pet. 16a). The complaint alleged that United's discount plan resulted in price discrimination between purchasers of products of like grade and quality, and that the effect of such discrimination "may be substantially to lessen competition" among retail grocers (R. 8–9).

[1] The Sawyer Division covers Illinois and portions of Indiana, Kentucky, Missouri, Iowa, Wisconsin, and Michigan.

[2] This plan was replaced by another on July 1, 1959, under which the maximum discount was the same, but applied only to monthly purchases of $150 or more (Pet. 19a).

At the conclusion of Commission counsel's case, the hearing examiner granted United's motion to dismiss the complaint, holding that there had been no showing that United's discount plan had the anti-competitive effects specified in the statute (Pet. 27a–28a). The examiner's decision was reversed on appeal to the Commission. The Commission held that, in determining whether price discrimination may cause substantial injury to competition in the secondary line, the proper test is that of *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37: if some purchasers regularly pay substantially more for like goods than their competitors, a probability of substantial competitive injury may be inferred. Noting that the retail food business is highly competitive, that low net profits are prevalent, that retailers are anxious to take advantage of cash discounts, and that the price of merchandise is "a very important, if not the most important, factor in enabling them to compete" (Pet. 35a), the Commission found that, on the record before it, United's volume discounts, ranging up to 6 percent, appeared substantial, and that, unless rebutted, the evidence would be "sufficient to support an order against respondent to cease and desist the price discrimination practice charged" (Pet. 35a). On remand, petitioner offered no rebuttal evidence, and the hearing examiner found that it had violated Section 2(a) (Pet. 55a). The Commission affirmed, issuing a final order which provided (Pet. 68a) that United

> * * * in connection with the sale and distribution of their food products in commerce * * *

> do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale of such products.

United petitioned the Court of Appeals for the Seventh Circuit to set aside the Commission's order. The court affirmed the Commission's order in its entirety. While noting that the dollar amount of the discrimination was relatively small (Pet. 8a), the court of appeals nonetheless agreed with the Commission that it was "substantial", and added that (Pet. 11a)

> even though price discriminations covering a single item in a grocery store may appear relatively insignificant when considered alone, they may assume the stature of substantiality when considered in the context of the store's total operation and as an incipient harm which would grow into reality if extended to all of the items handled by the grocer. * * *

The court also held that the Commission's cease and desist order was not unreasonably broad (Pet. 13a), and that the Commission had not abused its discretion in refusing to stay the effective date of the order until it determined whether petitioner's two largest competitors were complying with previously issued cease and desist orders similar in terms to the one issued against United (Pet. 14a).

ARGUMENT

1. The Commission held that an inference of probable substantial injury to "secondary-line" competition (*i.e.*, competition among customers of the seller charged with unlawful price discrimination) is warranted when some of the seller's customers are obliged on a continuing basis to pay substantially more for goods of like grade and quality than other competing customers (Pet. 34a). This is the plain teaching of *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, where, in sustaining the adequacy of the Commission's findings of competitive injury, this Court said, with specific reference to quantity discounts in the grocery industry (334 U.S. at 46–47):

> [T]he Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay. The findings are adequate.

In weighing substantiality, the Commission here carefully evaluated United's volume discount system in the light of the realities of competition in the retail grocery business. It found that that business is a highly competitive one, in which net profits are low, cash discounts and other allowances are important, and the cost of the merchandise to the retailer is a very important, if not the most important, factor in enabling him to remain competitive (Pet. 33a, 44a–45a). As the court below observed in rejecting United's attempt to attach a "*per se*" label to the Commission's action, "[a]ll the facts and circumstances of the case, including the amount of the dis-

counts, were considered by the Commission in reaching its conclusion" (Pet. 3a).

Petitioner contends (Pet. 16) that the Commission was required to make detailed findings concerning the manner in which competition in the resale of United's biscuit products might be impaired by its discrimination. This contention was properly rejected by the Commission (Pet. 33a) and the court of appeals (Pet. 7a). In *Morton Salt*—where the Commission had made an express finding that the amount of discrimination was so great as to affect the purchasers' resale price—this Court observed that the Commission had gone "much further in receiving evidence than the statute requires" (334 U.S. at 50):

> It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion * * *.

The court of appeals was also on sound ground in suggesting that the Commission might properly regard relatively small dollar amounts of discrimination in the sale of one item "as an incipient harm which could grow into reality if extended to all the items handled by the grocer" (Pet. 11a). It simply recognized the familiar rule that it is the Commission's and not the courts' function to determine

whether a particular form of price discrimination, considered in its industry setting, rises to the level of substantiality. See *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 739. And, plainly, the price discriminations which United's small customers suffered month after month were not trivial or *de minimis*. The systematic and continuing character of United's discrimination distinguishes this case from *American Oil Co.* v. *Federal Trade Commission*, 325 F. 2d 101 (C.A. 7), certiorari denied, 377 U.S. 954, where the same court of appeals found that price concessions given to retail gasoline dealers by their suppliers, but only during a seventeen-day gasoline "price war," could have had no more than a "temporary minimal impact on competition." 325 F. 2d at 106.

2. Contrary to petitioner's assertion (Pet. 23), the Commission's cease and desist order was not unreasonably broad. In sustaining it, the court below properly applied the principles of *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, and the cases cited therein. This Court has repeatedly recognized that the Commission's cease and desist orders need not be narrowly limited to a prohibition of the exact practice giving rise to the order; the Commission may also, by such orders, "prevent respondents from engaging in similarly illegal practices * * *." *Colgate-Palmolive, supra*, at 394–395; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473. The Commission was warranted here in believing that an order forbidding any secondary-line price discrimina-

tion by United was appropriate since a narrower order might invite evasion.

The Commission's order is not inconsistent with this Court's admonition in *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 367–368, that Commission orders be "clear and precise to avoid raising serious questions as to their meaning and application." The language of Section 2(a), which the Commission has employed in a number of other secondary-line price discrimination orders, is not inherently unclear or ambiguous, and, indeed, as a result of the many Commission and court decisions interpreting it, may have a more definite meaning than a novel formulation would. If there should arise situations in which petitioner is genuinely uncertain as to the applicability of the order, regular processes of the Commission are available for advice and guidance. See *Heavenly Creations, Inc.* v. *Federal Trade Commission*, 339 F. 2d 7 (C.A. 2), certiorari denied, 380 U.S. 955.

3. The court below declined to disturb the Commission's judgment that the order against United should become effective immediately and should not be stayed pending the Commission's final evaluation of compliance reports submitted by United's two major competitors. In so ruling, the court correctly applied *Moog Industries* v. *Federal Trade Commission*, 355 U.S. 411.

United's two competitors—National Biscuit Company and Sunshine Biscuit Company—are subject to cease and desist orders entered a number of years ago which are quite similar in terms to the order against

United.[4] To be sure, as United points out, since the orders against its competitors antedate the Finality Act of 1959, 73 Stat. 243, amending Clayton Act, Section 11, 15 U.S.C. 21, these companies, unlike United, would not be subject to civil penalties for violations of the orders until orders of enforcement were issued by a court of appeals. But these pre-Finality Act orders are not dead letters, without legal or moral effect. Neither the Commission nor the companies so regard them, as evidenced by the Commission's order to Sunshine and National to file supplemental reports of the manner of their compliance with the orders (R. 142), and by their prompt compliance. The Commission is currently considering these reports—a task complicated by the necessity of analyzing and investigating a very elaborate cost justification.

Thus, this is not a situation in which petitioner has been singled out for enforcement action while other important members of the industry engaging in similar practices are ignored. And any danger that petitioner might be competitively hurt by the self-enforcing character of the order the Commission entered against it has been largely eliminated by the Commission's notice to United (letter from the Secretary of the Commission, dated December 21, 1965, Appendix, *infra*, p. 13) that it will consider United's claim of competitive hardship when United files a compliance report as directed in the order; that it will act

[4] The cease and desist order originally entered against National Biscuit in 1944, 38 F.T.C. 218, was relatively narrow; it was modified and expanded in 1954, 50 F.T.C. 932. A cease and desist order similar to the 1954 order against National was entered against Sunshine Biscuit in 1955, 52 F.T.C. 110.

upon any request for relief "based on all the pertinent facts as then supplied by United and otherwise available to the Commission"; and that it will "not be disposed to" seek civil penalties with respect to any acts or practices undertaken by United in the interim.

In the circumstances, the court of appeals was correct in holding that there was no "patent abuse of discretion" by the Commission. As this Court said in the *Moog* case, *supra* (355 U.S. at 413):

> It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.

Petitioner asserts (Pet. 29–30), however, that the court of appeals' determination on this point is in conflict with the decision of another panel of the same court in *Universal-Rundle Corp.* v. *Federal Trade Commission*, 352 F. 2d 831, where it was held that the Commission had committed a patent abuse of discretion in issuing a final cease and desist order against Universal-Rundle before initiating proceedings against its principal competitors. Whether or not *Universal-Rundle* was correctly decided,* we note that in the

*The Solicitor General has not yet determined whether to file a petition for certiorari in that case.

present case cease and desist orders have already been issued against United's principal competitors and the Commission is actively considering the status of their compliance with those orders.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
HOWARD E. SHAPIRO,
MILTON J. GROSSMAN,
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JAMES McI. HENDERSON,
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J. B. TRULY,
Assistant General Counsel,
MILES J. BROWN,
Attorney,
Federal Trade Commission,

FEBRUARY 1966.

APPENDIX

DECEMBER 21, 1965.

WILLIAM SIMON, Esq.,
Howrey, Simon, Baker & Murchison,
1707 H Street NW.,
Washington, D.C., 20006.

DEAR MR. SIMON: This is in response to your letter of November 26, 1965, in which you make application on behalf of the United Biscuit Company of America for a stay in the effective date of the order issued against United in Docket No. 7817 until such time as the competitors of United, National Biscuit Company and Sunshine Biscuits, Inc., are in compliance with the orders issued against them. You state that in return United will withdraw its petition for certiorari.

The Commission will not enter into the arrangement which you suggest and stay the effective date of the order to cease and desist issued against United in Docket No. 7817. The Commission will consider respondent United's claim of competitive hardship if it is made at the time United files its compliance report under a final order to cease and desist, and the Commission's determination in response to a request for relief would, at that time, be based on all the pertinent facts as then supplied by United and otherwise available to the Commission. Pending such determination by the Commission, the Commission would not be disposed to initiate a civil penalty proceeding for acts and practices undertaken by United in complying with the order.

By the Commission:

(S) Joseph W. Shea,
JOSEPH W. SHEA,
Secretary.

cc: Roland D. Whitman, Esq., Ross, Hardies, O'Keefe, Babcock, McDugald & Parsons, 122 South Michigan Avenue, Chicago, Illinois, 60603.

U.S. GOVERNMENT PRINTING OFFICE: 1966

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 888

UNITED BISCUIT COMPANY OF AMERICA, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

The third question presented is whether the Federal Trade Commission was required to stay the cease and desist order in this case until it determined that United's two largest competitors were complying with outstanding cease and desist orders similar in terms to the one issued against United. Because the orders against the competitors antedate the Finality Act of 1959, 73 Stat. 243, amending the Clayton Act, Section 11, 15 U.S.C. 21, no sanctions for their violation can be imposed until orders of enforcement are issued by a court of appeals (Br. in Opp. 10).

207-376—66——1

On February 4, 1966, the Court of Appeals for the Ninth Circuit in *Federal Trade Commission* v. *Jantzen, Inc.* (No. 20021; printed as an Appendix hereto, *infra*, pp. 3–18) held that Congress, in passing the Finality Act, repealed the enforcement provisions of Section 11, so that pre-Finality Act orders such as those outstanding against United's competitors are unenforceable. Whether the *Jantzen* decision is right or wrong, it does not help petitioner here. Should *Jantzen* come to be accepted as correctly stating the law, and the orders against United's competitors be thereby deprived of any teeth, United will be free to seek from the Commission appropriate relief against such competitive hardships, if any, as might be created by compliance with the Commission's order. The Commission has already manifested its willingness to consider any claim of competitive hardship made by United when the order becomes final and effective (Br. in Opp. 10–11).

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JAMES McI. HENDERSON,
General Counsel,
Federal Trade Commission.

FEBRUARY 1966.

APPENDIX

United States Court of Appeals for the Ninth Circuit

No. 20021

FEDERAL TRADE COMMISSION, PETITIONER

v.

JANTZEN, INC., RESPONDENT

February 4, 1966

Petition to Enforce an Order of the Federal Trade Commission

Before POPE, JERTBERG, and DUNIWAY, *Circuit Judges*

DUNIWAY, *Circuit Judge*:

The Federal Trade Commission seeks enforcement of a cease and desist order, issued by it on January 16, 1959 (55 F.T.C. 1065) and modified on March 26, 1959.[1] No proceedings relating to the order were begun by either party in this court or any court until the present petition was filed on April 22, 1965. It arises from a proceeding begun by the Commission

[1] The order was issued pursuant to a written consent, whereby Jantzen waived any further procedural steps, the making of findings of fact and conclusions of law, and all right to contest the validity of the order.

on July 22, 1964, based upon the Commission's belief that Jantzen might not be complying with the order. At a prehearing conference on November 23, 1964, Jantzen admitted certain violations of the order. At the same time Jantzen took the position (1) that the order is invalid and (2) that, if it is valid, there is no method provided by law for its enforcement. It presents the same contentions here. We hold that we have no jurisdiction in this proceeding, and therefore do not pass upon the first question.

The cease and desist order followed the filing of a Commission complaint that charged violation of Section 2(d) of the Clayton Act, 38 Stat. 730 (1914) as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13(d) (1964). The Commission was authorized to issue such an order by Section 11 of the Clayton Act, 38 Stat. 734 as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 21 (1958). We therefore refer to it as a "Clayton Act order," to distinguish it from orders issued by the Commission in the course of its duty to enforce the Federal Trade Commission Act, 38 Stat. 717, 719, § 5 (1914), 15 U.S.C. § 45, as amended. We refer to these as F.T.C. Act orders.

Until 1938, the method of enforcing both types of orders was essentially the same. Section 11 of the Clayton Act, *supra*, as it read when the order here involved was issued, contained 7 paragraphs. The first authorized the Commission to enforce, *inter alia*, section 2. The second set up a procedure for the issuance by the Commission and service of a complaint for a hearing, and, upon finding violation, for the issuance of a cease and desist order. The third dealt with enforcement of such an order, and read, in pertinent part, as follows:

> "If such person fails or neglects to obey such order of the Commission * * * while the same is in effect, the Commission * * * may apply to the United States Court of Appeals * * * for the enforcement of its order * * *. [T]he court * * * shall have power to make and enter * * * a decree affirming, modifying, or setting aside the order of the commission * * *. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari * * *." (64 Stat. 1127-8)

The fourth gave the respondent a similar right to petition the Court of Appeals for review of the order, without limit as to the time within which to do so. The remaining 3 paragraphs are not material to our problem.

Section 5 of the Federal Trade Commission Act, *supra*, contained, in its third, fourth and fifth paragraphs, substantially identical provisions regarding F.T.C. orders.

No penalty attached to the violation of either type of order. In order to obtain an enforcing order in the Court of Appeals, a second violation had to be shown. This was done, as in this case, by the Commission's ordering an investigation, appointing a hearing officer, and, usually, holding a hearing.[2] (See the Commission's Rules at 16 C.F.R. § 1.35.) If a violation was found, the Commission then sought enforcement in the Court of Appeals. No penalty attached to this second violation, other than the entry by the court of a decree enforcing the order. Such a decree had the force of an injunction, and, if thereafter the Com-

[2] A hearing was not necessary here, because of Jantzen's admissions and stipulation of violation at a pre-hearing conference.

mission found further violation, it could bring the respondent before the court for punishment for contempt.

Not surprisingly, this very clumsy and time consuming procedure was severely criticized, and in 1938 the Congress responded by adopting the Wheeler-Lea Act, 52 Stat. 111, section 3 of which (52 Stat. 111–114) amended section 5 of the Federal Trade Commission Act. That section (3) states: "Section 5 of such Act * * * is amended to read as follows: * * *." The amended section contains 12 paragraphs designated (a) through (*l*). Paragraph (b) retains substantially the same provision for the issuance of cease and desist orders as was contained in the old third paragraph. Paragraph (c), however, is different. It provides for a petition by the respondent to the Court of Appeals for review of the order. The petition must be filed within sixty days from the date of service of the order. The court has similar powers to those conferred by the old section, but with the added power to decree enforcement. In general, the new paragraph (c) is comparable to the old fifth paragraph of the section (38 Stat. 720). The former fourth paragraph, providing for a petition by the Commission, is omitted. Paragraphs (g), (h), (i), and (j) provide for the finality of Commission orders—either when the period in which to petition for review expires or, if there be such a petition, then within a fixed time after the completion of subsequent court and Commission proceedings. All of this is new, as is paragraph (*l*). It subjects violators of final orders to "a civil penalty of $5000 for each violation." This has been since amended (64 Stat. 21, 1950) to provide that each separate violation shall be a separate offense, and, if the violation is a continuing one, each day of its continuance is a separate offense.

The normal rule is that when an Act amends a previous Act "to read as follows" this is as much an express repeal of those provisions which are omitted[3] as it is an express enactment of those provisions which are added and a continuation in effect, rather than a repeal and new enactment, of those provisions which remain unchanged.

No doubt in recognition of this rule, the Wheeler-Lea Act deals with its effect on pending cases. Section 5(a) of the amending Act reads:

> "(a) In case of an order by the Federal Trade Commission to cease and desist, served on or before the date of the enactment of this Act, the sixty-day period referred to in section 5(c) of the Federal Trade Commission Act, as amended by this Act, shall begin on the date of the enactment of this Act." (52 Stat. 117)

Thus, if the order before us were an F.T.C. order, we would have no problem. The order would be final and enforcible via the civil penalty route, and the Commission would not be here.

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[3] No doubt the Congress could add to each such amending statute a provision that "everything omitted by this Act from the statute (or section) that is hereby amended is hereby repealed," or other words to like effect, but the law does not require such laborious absurdities. See *Heinze v. Butte & Boston Consol. Mining Co.*, 9 Cir., 1901, 107 Fed. 165, 167; *United States v. Kelly*, 9 Cir., 1899, 97 Fed. 460, 462; *United States v. Baker*, 3 Cir., 1961, 293 F. 2d 613, 617–18; *H. Rouw Co. v. Crivella*, 8 Cir., 1939, 105 F. 2d 434, 436; *Rowan v. Ide*, 5 Cir., 1901, 107 Fed. 161; *Columbia Wire Co. v. Boyce*, 7 Cir., 1900, 104 Fed. 172, 174; Endlich, *Interpretation of Statutes* § 196 (1888); Crawford, *Statutory Construction* §§ 304, 305 (1940); 1 Sutherland, *Statutory Construction* § 1932 (3d ed. 1943); 82 C.J.S., Statutes, § 294, pp. 503–4; *cf. Posadas v. National City Bank*, 1936, 296 U.S. 497, 502–6; *Murdock v. City of Memphis*, 1875, 87 U.S. (20 Wall.) 590, 617; *Stewart v. Kahn*, 1870, 78 U.S. (11 Wall.) 493, 502.

But Clayton Act orders were not affected by the Wheeler-Lea Act. They are, however, affected by the so-called Clayton Finality Act, 73 Stat. 243 (1959); 15 U.S.C. § 21 (1964). In substance, it does for Clayton Act orders what the Wheeler-Lea Act did for F.T.C. orders. The technique of amendment is the same. It provides, in pertinent part:

> "(a) the first and second paragraphs of section 11 of the [Clayton] Act * * * are hereby redesignated as subsections (a) and (b) of such section, respectively."

It then adds a sentence to the second paragraph, which it designates as (b), dealing with proceedings before the Commission leading to issuance of a cease and desist order. It continues:

> "(c) The third, fourth, fifth, sixth, and seventh paragraphs of such section are amended to read as follows:
>
> (c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside * * *." (73 Stat. 243)

It is unnecessary to reproduce the balance of the amended section. It is almost verbatim the same as section 5 of the Federal Trade Commission Act as amended by the Wheeler-Lea Act. The effect of the statute is to produce a revised section 11 of the Clayton Act, containing 12 paragraphs designated (a) through (*l*), and providing the same method of review at the instance of the respondent only, the same

power of the court, the same time limitation, the same rules as to finality, and the same civil penalties for violations as does amended section 5 of the Federal Trade Commission Act.

The former third paragraph which we have quoted in part earlier in this opinion is omitted in its entirety. That is the paragraph which provided for the type of proceeding to enforce, brought here by the Commission, that is now before us. For reasons already stated, we are of the opinion that the amendment, by omitting the third paragraph, repealed it.

Like the Wheeler-Lea Act, the Finality Act contains a paragraph relating to prior cases, which reads:

> "SEC. 2. The amendments made by section 1 shall have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914 (38 Stat. 734, as amended; 15 U.S.C. 21). Each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act." (73 Stat. 245–46)

It will be noted that, unlike the corresponding section 5(a) of the Wheeler-Lea Act, this section does not deal with cease and desist orders issued before its effective date, nor provide for their becoming final within the meaning of the amended Act. It deals solely with proceedings begun in a Court of Appeals, which is the subject to which the former third and fourth paragraphs related. Thus the third paragraph is expressly continued in effect for this very limited purpose, namely, the completion of proceed-

ings for enforcement initiated by the Commission in a Court of Appeals. To us, this is a strong indication that the Congress knew, and intended, that it was repealed for other purposes. The Finality Act is closely modelled on the Wheeler-Lea Act, which makes the difference between section 2 of the Finality Act and section 5(a) of the Wheeler-Lea Act even more significant.

It is significant, too, we think, that immediately after the adoption of the Finality Act, the Commission itself took the position that existing Clayton Act orders would become final within 60 days, under the new law, just as under the Wheeler-Lea Act, even though the Finality Act does not contain the language to that effect that appears in section 5(a) of the Wheeler-Lea Act. The Court of Appeals for the District of Columbia Circuit refused to accept this view. *Sperry Rand Corp. v. FTC,* 1961, 288 F. 2d 403; *Schick Inc. v. FTC,* 1961, 288 F. 2d 407; *FTC v. Nash-Finch Co.,* 1961, 288 F. 2d 407. In its briefs in those cases, the Commission strongly urged that the former enforcement procedure, which it now seeks to invoke, was no longer in effect.

The Commission's present position is directly contrary to the position that it took then. This does not necessarily mean that its present view is wrong.[4] It

[4] We think that it does mean, however, that we owe little, if any, deference to the Commission's views as to what the statute does. A consistent interpretation of a statute by the body created to administer it is indeed entitled to judicial respect. But it goes beyond all reason to apply the same rule to diametrically inconsistent positions taken by such a body. If we owe any deference to the Commission's views, it is to those that were contemporaneous with the enactment of the statute, the adoption of which it helped to procure. (*Cf. FTC v. Mandel Bros., Inc.,* 1959, 359 U.S. 385, 391; *Norwegian Nitrogen Prods. Co. v. United States,* 1933, 288 U.S. 294, 315.)

relies, first, upon the established rule of statutory construction, that repeals by implication are not favored. That rule, however, does not apply here. As we have already indicated, we think that that the repeal in this case was express. (See also, *Sperry Rand Corp, v. F.T.C., supra.*)[5]

It next urges that the purpose of the Clayton Finality Act was to establish, for Clayton Act orders, the same method of enforcement as was already applicable under the Wheeler-Lea Act to F.T.C. orders.

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[5] Of the five cases principally relied upon by the Commission, three are not even closely in point. Each deals with a supposed conflict between two separate statutes or sections, adopted or amended at different times, not with a statute expressly amending a particular statute or section to read in a different way. (*Mercantile Nat'l Bank v. Langdeau*, 1963, 371 U.S. 555, 565–67; *United States v. Borden Co.*, 1939, 308 U.S. 188, 198–201; *Lietz v. Flemming*, *6 Cir.*, 1959, 264 F. 2d 311, 313.) Two others are more closely in point, but do not involve the effect of the omission, in the amending statute, of a provision that was contained in the same statute before the amendment. They both hold that, insofar as former language is retained in the amended section, there has not been a repeal and a new enactment, but only the continuance in effect of the old provisions that are thus retained. (*Posadas v. National City Bank*, 1936, 296 U.S. 497, 506; *Rithole v. March, D.C., Cir.*, 1939, 105 F. 2d 937.) *Rithole* is the converse of this case. It deals with the Wheeler-Lea Act, and holds that, because the portion of section 5 of the Federal Trade Commission Act authorizing the Commission to issue cease and desist orders was retained in the amended section, there was no repeal and new enactment of that portion, but that it continued in effect. We quite agree, but that does not answer the question here posed.

There is no doubt that that was the purpose.* There is also no doubt that, as to future orders, that purpose was fully accomplished. But it is equally clear, as we have already shown, that the Congress dealt

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*The title of the Clayton Finality Act reads:

"AN ACT

To amend section 11 of the Clayton Act to provide for the more expeditious enforcement of cease and desist orders issued thereunder, and for other purposes." (73 Stat. 243)

The House Report accompanying the Act, H.R. Rep. No. 580, 86th Cong., 1st Sess. 4, quoted in *FTC v. Henry Broch & Co.*, 1962, 368 U.S. 360, at 365–66 n. 6, says:

"The Clayton Act, in its present enforcement procedures, permits a person to engage in the same illegal practices three times before effective legal penalties can be applied as a result of action by the commission or board vested with jurisdiction. First, in order to issue and serve a cease-and-desist order initially, the commission or board must investigate and prove that the respondent has violated the prohibitions of the Clayton Act. No provision of the Clayton Act, however, makes the commission or board's cease-and-desist order final in the absence of an appeal by the respondent for judicial review. At the present time, the Clayton Act contains no procedure by which the commission or board may secure civil penalties for violations of its orders.

"Second, before the commission or board may obtain a court ruling that commands obedience to its cease-and-desist order, it must again investigate and prove that the respondent has violated both the order and the Clayton Act. The jurisdiction of the court of appeals, under the present provisions of Clayton Act section 11, cannot be invoked by the the commission or board unless a violation of the cease-and-desist order is first shown.

"Third, enforcement of the court's order must be secured in a subsequent contempt proceeding, which requires proof that new activities of the respondent have violated the

with orders already outstanding in a different manner in the two Acts. In the case of F.T.C. Act orders, it made the new remedy fully applicable to existing orders. In the case of Clayton Act orders, it did not do this. Instead, it expressly preserved the old methods, but only as to a limited class of such orders.

The Commission says that it has case authority for its position. It cites two cases in which enforcement of a pre-Finality Act order was decreed, without opinion: *FTC v. Pacific Gamble Robinson Co.*, 9 Cir., 1962, No. 18260, not reported, and *FTC v. Benrus Watch Co.*, 2 Cir., 1962, No. 27752, not reported. The order was not opposed in either case. These cases are not authority on the question.[1] It also cites two cases involving investigations by it to determine whether pre-Finality Act orders were being obeyed: *Wanderer v. Kaplan*, D.D.C., 1962, CCH Trade Cases, ¶70,535; *Nash-Finch Co. v. FTC*, D. Minn., 1964, 233 F. Supp. 910. Neither of these cases involved the jurisdiction of a Court of Appeals to enforce such an order. Such dicta as they contain is hardly authoritative on the question.

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court's order. This entails a third hearing before the commission and a review thereof by the court of appeals.

"In contrast, the procedures that are contained in the Federal Trade Commission Act for enforcement of cease-and-desist orders issued thereunder are much simpler and more direct. A cease-and-desist order issued pursuant to section 5 of the Federal Trade Commission Act, as amended, becomes final upon the expiration of the time allowed for filing a petition for review, if no such petition is filed within that time."

[1] *Brown Shoe Co. v. United States*, 1962, 370 U.S. 294, 307; *Cross v. Burke*, 1892, 146 U.S. 82, 87.

Next, it cites dicta in *Sperry Rand Corp. v. FTC, supra*,[7] and language in *FTC v. Henry Broch & Co., supra*, fn. 6.[8] It is perfectly clear that the question here presented was not before the court in either case. We have already discussed *Sperry Rand Corp.* The *Broch* case also involved a pre-Finality Act order, issued December 10, 1957. The respondent petitioned for review, and the Seventh Circuit set the order aside on December 11, 1958 (*Henry Broch & Co. v. FTC*, 261 F. 2d 725). The Commission sought and obtained certiorari, and the Supreme Court reversed

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[7] There the court said:

"Enforcement due to any violation of the consent order which might occur is left to the provisions of the statute as they existed at the time the order was entered. It follows that the basis for the relief sought, namely, review of the order of November 3, 1958, and of the order of the Commission denying petitioner's motion to modify or set aside the order of November 3, 1958, disappears." (288 F. 2d at 406–7)

[8] The language relied on is:

"In considering *Broch's* challenge to paragraph (2) it is necessary to observe that the 1959 amendments to § 11 of the Clayton Act—which substitute for the Clayton Act provisions for enforcement of administrative orders those in § 5 of the Federal Trade Commission Act—do not apply to enforcement of the instant order. In consequence, Broch cannot be subjected to penalties except for violation of an enforcement order yet to be entered by an appropriate Court of Appeals, to be predicated upon a determination that some particular practice of Broch violated the Commission's order. Thus Broch is not, by virtue of that order, presently acting under the risk of incurring any penalty without further administrative and judicial consideration and interpretation, despite the fact that he has already received determination of his petition for review. Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 477–480." (368 U.S. at 364–65)

on June 6, 1960 (*FTC v. Henry Broch & Co.*, 1960, 363 U.S. 166). On remand, the Seventh Circuit modified the order, and affirmed it as modified on November 3, 1960 (*Henry Broch & Co. v. FTC*, 285 F. 2d 764). The Commission again sought certiorari, and again the Supreme Court granted it, and reversed (368 U.S. 360). Thus, when the Finality Act was passed in 1959, the *Broch* case was one of those in which a proceeding had been initiated under the fourth paragraph of section 11 of the Clayton Act. It falls squarely within the language of Section 2 of the Finality Act, and the Supreme Court's language, as applied to it, is clearly correct. As applied to this case, which does not fall within Section 2, the language is not even applicable dictum.

Finally, the Commisson asserts that, unless its views are accepted, "forty-five years of Clayton Act enforcement and almost 400 orders to cease and desist would be wiped from the books." It urges that this result is quite contrary to the congressional intent, which was, as we have seen, to strengthen enforcement by the Commission of the Clayton Act. It says that Congress "did not intend to grant amnesty to the almost 400 law violators under order." To these arguments there are two answers, one legal, the other practical.

The legal effect of the Commission's argument is to ask us to insert into the Finality Act something that is not there. In *Sperry Rand Corp., supra*, the Commission asked the court, in substance, to insert into the Finality Act the provisions of section 5(a) of the Wheeler-Lea Act. Indeed, it had tried to accomplish the same thing by press release. The court quite properly declined to do what the Commission asked. (See 288 F. 2d at 406.) What we are now

asked to do, in substance, is to insert into section 2 of the Finality Act a provision making it applicable to outstanding cease and desist orders as to which proceedings had *not* been initiated, before the date of enactment, under the third and fourth paragraphs of the former section 11 of the Clayton Act, and this in spite of the fact that the section applies only where such proceedings, *have* been initiated. Whether the omission of such a provision was intentional, as it may have been, or inadvertent, as it may also have been, is immaterial. It is not the business of courts, under the guise of construction, to put into a statute what Congress has left out.[10]

The practical answer to the Commission's argument is clear. The Commission is indulging in hyperbole. We do not, by our holding, wipe forty-five years of Clayton Act enforcement and almost 400 orders to cease and desist from the books, nor do we grant amnesty to any law violator, much less to 400. The orders are still there, and still as valid as they ever were. Part of the Commission's function has always been to educate and to persuade. The orders, and the Commission's opinions and findings on which they are based, are just as authoritative and persuasive as they ever were. There is a presumption that people obey the law; we would suppose that it applies to obedience to FTC orders. The fact that there are 400 orders outstanding from forty-five years of enforcement, none of which the Commission has yet sought to enforce, is somewhat persuasive that the presumption is a valid one.

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[10] *Hanover Bank v. Commissioner*, 1962, 369 U.S. 672, 677-678; *Iselin v. United States*, 1926, 270 U.S. 245, 251; *Ebert v. Poston*, 1925, 266 U.S. 548, 554.

Moreover, as the Commission points out in its brief, the former enforcement procedures were "somewhat inadequate," since "no meaningful sanctions were provided for enforcement of cease and desist orders." The Commission says:

> "Senator Sparkman, speaking on the floor of the Senate in 1957, commented (103 Cong. Rec. 690): 'In this light it is readily understandable why contempt proceedings to enforce a Clayton Act order have been successful only twice since 1940.'"

See also fn. 6, *supra*. We cannot see any good reason why the Commission is so desirous of perpetuating so poor a method of enforcement,[11] with its requirement that three successive violations be found before one can be punished. (*FTC v. Ruberoid Co.*, 1952, 343 U.S. 470.) All that the Commission has to do where it finds a violation of the Clayton Act that is also a violation of an old cease and desist order is to enter a new cease and desist order. Such an order will give the Commission the full benefit of the Finality Act, and after only two bites at the apple instead of three.

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[11] The Commission, in its brief, says that the system that it here seeks to perpetuate was characterized, in Congressional hearings as "ineffectual; cumbersome; lacking teeth; awkward, slow and without meaningful sanction; intolerable, laborious, time consuming, very expensive and entirely unnecessary; inadequate; ponderous; shocking; wasteful and uneconomic," and its enforcement of its orders under that system as "handicapped, hampered and weakened," leaving the Commission "poorly equipped to discharge its responsibilities," and leading to "diminution of the intended purpose" of the Clayton Act. We find it not surprising that Congress did not choose to perpetuate such an obviously objectionable system. We also find it somewhat surprising that the Commission is now asking us, by a bit of judicial legerdemain, to recreate it.

Congress may well have felt that this was a better disposition of old cases than to perpetuate the old system as to old orders. This, we think, is the result of what Congress did.

In its reply brief, the Commission suggests, for the first time, in a footnote, that the General Savings Statute, 61 Stat. 635 (1947), 1 U.S.C. § 109, preserves the remedy that it seeks.[12] We think not. This proceeding is not based upon a violation that occurred *before* the Finality Act was adopted, but on further violations occurring *after* its adoption in 1960 and 1962. (See *FTC v. Ruberoid Co., supra.*) Thus there is not here involved a "penalty, forfeiture or liability" incurred under the former statute. Here, we deal with a statute which formerly conferred jurisdiction on this court, and which, except as to a limited class of cases, of which this is not one, has been repealed. *Cf. De La Rama S.S. Co. v. United States,* 1953, 344 U.S. 386, 390. Moreover, the violations which, had they occurred before the enactment of the new statute, were a prerequisite to our jurisdiction, are, under the new statute, the basis for a new cease and desist order, enforcible by what the Commission says is a better method. *Cf. United States v. Obermeier,* 2 Cir., 1950, 186 F. 2d 243, 251–55, *cert. denied,* 1951, 340 U.S. 951.

The petition is dismissed for want of jurisdiction.

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[12] "§ 109. *Repeal of statutes as affecting existing liabilities.* The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability . . . ."

U.S. GOVERNMENT PRINTING OFFICE:1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 888

UNITED BISCUIT COMPANY OF AMERICA, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Reply to Brief and Supplemental Memorandum of the Federal Trade Commission in Opposition

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1. On February 16, 1966, the Commission filed a supplemental memorandum solely for the purpose of calling this Court's attention to the recent decision of the Ninth Circuit in *Federal Trade Commission* v. *Jantzen, Inc.,* rendering unenforceable all pre-Finality Act orders of the Commission. Contrary to the contention made by the Commission in its memorandum (p. 2), the *Jantzen* decision has a direct and immediate impact upon this case.

Prior to the filing of its brief in this Court, the Commission defended its denial of the stay sought by United on the ground that Commission orders had been entered against United's two major competitors, and hence that a final order against United would merely place United "more nearly on a par with its major competitors." (R. 140-141) As United pointed out in its petition, however, the issuance of these orders was without practical significance since each of the competitors was continuing to grant essentially the same discounts as before, while the Commission had failed to secure compliance with its orders for over ten years.

In its brief the Commission, now apparently recognizing that the mere existence of unenforced orders against these competitors would not justify its refusal to stay the order against United, argues that these orders were not "dead letters." (Br. in Op., p. 10) Thus, the Commission now seeks, for the first time, to create the impression that the Commission has been and is actively and diligently attempting to secure compliance with its orders against National and Sunshine. It states that National and Sunshine have manifested "their prompt compliance" by filing supplemental reports in response to a compliance directive issued nearly two years ago; that the Commission is "currently considering these reports"; that its task is "complicated by the necessity of analyzing and investigating a very elaborate cost justification"; and that the Commission is "actively considering" the status of these companies' compliance with those orders. (Br. in Op., pp. 10, 12) Surely everything in the public record in this proceeding belies these assertions.

One may wonder what "prompt compliance" and "active" and "current" consideration mean when

cease and desist orders have been outstanding and unenforced for over a decade—in the case of National since 1944 (modified and expanded in 1954), and in the case of Sunshine since 1955.

As for the "very elaborate cost justification" study, no suggestion has hitherto been made in the course of this lengthy litigation of the submission of any cost justification study. So far as United is concerned, it knows of no such study having been submitted. Prior efforts by United to ascertain what compliance reports, if any, had been submitted by National and Sunshine were rebuffed by the Commission on the grounds that the information was "confidential" and "irrelevant." (R. 94-97, 109). After reading the statement in the Commission's Brief in Opposition and determining that it had no record basis, counsel for United inquired of the Commission's staff whether any such cost justification study had been presented and was told that the Commission was not in a position to either affirm or deny the filing of any such cost justification study. Counsel for United then inquired of the author of the Brief in Opposition at the Department of Justice to ascertain the basis for the statement. The latter acknowledged that he had never seen such a study, but stated that he had been told over the telephone by someone at the Commission that such a cost justification study had been submitted about two and one-half years ago.

The Commission presumably offers its representations concerning the submission of compliance reports with "very elaborate cost justification" and their "active consideration" by the Commission as material points for this Court's consideration in the disposition

of this petition. Under the circumstances, however, where United is not in a position to determine the accuracy of these representations, United submits that they should not be taken into consideration by this Court.

Apart from any question as to the past or present efforts of the Commission to secure compliance, the *Jantzen* opinion, as the Commission recognizes in its memorandum, (p. 2), may correctly state the law, and if it does, then the Commission will *not* be in a position to enforce its old orders against United's two major competitors. Thus, the *Jantzen* opinion has reinforced in a dramatic way the inequity that will result to United, for it points up the intolerable competitive position in which United will be placed vis-a-vis its largest competitors, if its order alone becomes immediately effective.

Even assuming that the *Jantzen* decision is subsequently held to be incorrect, the practical and immediate effect of that decision is to frustrate and postpone all attempts by the Commission to enforce the orders against United's two competitors, National and Sunshine. During this interim period, the Commission will not be in a position to press for judicial or even administrative enforcement of those orders. If United's order becomes final and effective, United then will be the only one of these companies subject to an order which may be immediately enforceable in the courts.

Following the decision by the Court of Appeals in this case, but prior to the filing of its petition for certiorari, United on November 26, 1965 filed an application with the Commission asking that the Commission exercise its discretionary authority to stay the effective date of its order until compliance was obtained

against National and Sunshine and to convene an industry conference of the three largest companies with a view to uniform elimination of volume discounts. The Commission responded to this application by the notice of December 21, 1965, which it has attached to its brief. As the notice shows, the Commission did not accept the application or resolve the problem of uniform treatment.

We have attached hereto, as Appendix A, United's application, which details the immediate and irreparable competitive injury that United will suffer if its order becomes final and effective while its major competitors remain free to continue using their volume discount schedules. Everything stated in the application, especially as it relates to the immediate irreparable injury to United, takes on a new urgency in light of the *Jantzen* decision, for that decision has the effect of wiping out the old orders against National and Sunshine and leaving United alone subject to an order requiring the discontinuance of all volume discounts. Such an order, as the application makes clear, would prove disastrous for United.

Thus, since the Court of Appeals passed on the question of the stay, two important changes have taken place. First, the *Jantzen* opinion was handed down, rendering ineffective the outstanding orders against United's two competitors; and second, the Commission, in its letter dated December 21, 1965, denied United's renewed request for a stay, although in its brief in this Court, it now recognizes that competitive hardship should be considered as a ground for postponing the effectiveness of United's order. These new developments in themselves warrant reconsideration by the Court of Appeals of United's request for a stay of its

order, particularly in light of that Court's opinion in *Universal-Rundle.*

Significantly, the Commission does not question the actual conflict in decisions between *Universal-Rundle* and the instant case. It merely seeks to distinguish *Universal-Rundle* by noting that "in the present case cease and desist orders have already been issued against United's principal competitors". (Br. in Op., p. 11) But, as pointed out above, even this distinction is no longer valid in light of the *Jantzen* decision. The *Jantzen* decision, in fact, brings into sharper focus the conflict between *Universal-Rundle* and the instant case.

In view of this conflict in decisions and the general importance of the issue of equitable enforcement of Commission orders, now highlighted in this case by the *Jantzen* decision, we submit that review should be granted. Because of the interrelated character of this issue presented in this case, *Universal-Rundle,* and *Jantzen,* this Court may wish to postpone disposition of this petition until the Government has indicated whether it will seek writs of certiorari in *Universal-Rundle* and *Jantzen.*

2. The Commission's brief ignores the basic issue raised by the first question presented in the petition, namely, that the Court of Appeals did not adopt the test of competitive injury used by the Commission but substituted a new test of its own. The Commission's brief does not even acknowledge, let alone defend, the novel interpretation of *Morton Salt* put forth by the Court of Appeals, but falls back on the automatic inference test used by the Commission. (See Br. in Op., pp. 6-8) Certainly that test as formulated and applied by the Commission cannot be regarded as "the plain

teaching" of *Morton Salt*. As the Commission admits in its brief, there was in *Morton Salt* "an express finding that the amount of discrimination was so great as to affect the purchasers' resale price." (Br. in Op., p. 7) In this case, however, there was no such finding, nor was there any evidence upon which to base any such finding.

For these additional reasons, we submit the petition should be granted.

Respectfully submitted,

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February 1966.

APPENDIX A

LAW OFFICES OF
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November 26, 1965

Federal Trade Commission
Washington, D. C. 20580

Attention: Joseph W. Shea, Secretary

Re: United Biscuit Company of America, a corporation, Docket No. 7817.

Gentlemen:

This is an application to stay the effective date of the Commission's order issued against United Biscuit Company of America (United) in Commission Docket No. 7817.

SUMMARY STATEMENT

United is in the business of manufacturing and selling cookies and crackers, commonly referred to as biscuit products. There are three nationwide, or virtually nationwide, sellers of cookies and crackers: National Biscuit Company (National), Sunshine Biscuits, Inc. (Sunshine), and United. These three sellers account for about 65% of total industry sales. National is by far the dominant company in the industry. Its sales are over 60% of the combined sales of the three leading companies. Sunshine is the number two company. United, a poor third, competes with National and Sunshine wherever United sells.

The Commission's case against United involved volume discounts, a practice initially originated by National and used by all major sellers in the industry for a quarter of a century. Although broad Section 2(a) orders were issued by the Commission against National and Sunshine

more than ten years ago against the granting of such discounts, those two companies have given and still continue to employ them. As more fully shown below, each of the companies now gives discounts and allowances which, in practical effect, result in a total discount ranging up to 6% (plus a 1% cash discount) of accumulated monthly purchases.

THE BISCUIT INDUSTRY

National's 1964 sales were $607.5 million, its 1964 profits were $36.5 million, and its assets were then $330 million. Sunshine's 1964 sales were $207 million, its 1964 profits were $7.3 million and its assets were then $101.3 million. United's 1964 sales were $126.6 million, its profits $1.1 million, and its assets were then $56.4 million. National's sales are thus 65% of the total sales of the three companies, Sunshine's 21% and United's less than 14%. (See enclosed chart showing annual sales of these three companies from 1955 to 1964.)

While National's 1964 sales were almost 5 times those of United, its profits were more than 30 times United's profits. And while Sunshine's sales are somewhat less than double United's sales, Sunshine's 1964 profits were approximately 7 times United's profits. More significant is the fact that sales and profits have increased for National and Sunshine, but have declined for United during the past decade.

National's sales have climbed from $389 million in 1955 to $452 million in 1960 to $607 million in 1964; its profits jumped from $18 million in 1955 to $30 million in 1960 and then to $36.5 million in 1964. Sunshine's sales went from $119 million in 1955 to $193 million in 1960 to $207 million in 1964; its profits increased from $6 million in 1955 to $8 million in 1960 and then to $7.3 million in 1964.

United, on the other hand, had 1955 sales of $127 million, which increased to $131 million in 1960, but then dropped to $126 million in 1964; its profit fell from $3.6 million in 1955 to $2.4 million in 1960, and then further declined to $1.1 million in 1964.

There have been changes in the discount schedules of each of the three companies over the years, but basically each company has been doing substantially the same thing since before the Commission issued its complaint against National over 20 years ago. The Commission has attacked the discount schedules of each of the 3 companies. The first complaint was issued against National, presumably because of its dominant position, 22 years ago. The complaint against Sunshine issued 11 years ago and against United 5 years ago. The language of the orders against each company is without significant difference, but because the National and Sunshine orders issued before the enactment of the Finality Act of 1959, those orders are in effect sterile, leaving the 2 companies free, if they choose to do

so, to ignore the Commission's orders without penalty. The order against United, however, carries the severe penalties of the 1959 Act.

PROCEEDINGS AGAINST NATIONAL

On July 20, 1943, the Commission issued its complaint against National, Docket No. 5013, charging a violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by National by discriminating in price among competing customers through the use of its quantity discount schedule in the sale of biscuits and crackers. On February 23, 1944, on a stipulation of facts, the Commission issued an order to cease and desist against National. The order is reported at 38 F.T.C. 213. On April 26, 1954, the Commission modified its order against National. The modified order is reported at 50 F.T.C. 932. In pertinent part, the modified order directs National to cease and desist, in the sale of bakery packaged food products, from selling such products at uniform prices "and thereafter granting varying discounts therefrom in the manner" found in the findings (which were volume discounts, described in 38 F.T.C. at pp. 220 and 221) or "*otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality where said purchasers in fact compete in the sale and distribution of such products.*" (Emphasis added)

The continued use of discounts by National and the status of the matter in the Commission during the last 16 years are reported in detail by Dr. Corwin D. Edwards in his book, *The Price Discrimination Law,* published in 1959. Dr. Edwards (former Commission Chief Economist) states that in 1949 the Compliance Division of the Commission challenged National's continued use of the discounts, that National made changes in its discount schedules, that in 1956, at the Commission's request, National filed an additional compliance report, and that when the book was

written National's "latest discount structure was being discussed with the Commission." (pp. 257-9) Dr. Edwards also reviews the data National submitted in support of its contentions as to the validity of the various discounts, and states in a footnote that National "asserted that its present discount structure is amply cost justified by a cost study made in 1949 but has not chosen to submit the evidence as to cost or to rest its case on this ground."

Nine years after the Commission directed National to file, within 60 days, "a report in writing setting forth in detail the manner and form in which it has complied with this modified order," the Commission formally stated that, "under the modified order [in *National*] no report of compliance has been received and filed as showing compliance."[1] Now, 2½ years later and more than 12 years after the issuance of the Commission's modified order, we are advised that no report by National of compliance with the modified cease and desist order has been received and filed showing compliance.

[1] Opinion dated April 19, 1963 in Docket No. 7817.

NATIONAL'S PRESENT DISCOUNTS

National's printed price list, dated April 1, 1964, publicly and openly disseminated to the trade, states the availability of the following discounts based upon monthly purchases, going up to 6% (exclusive of the 1% cash discount):

Discounts		*Rate*
Store:	$ 1.00 to $ 19.00	None
	20.00 to 34.00	1%
	35.00 to 49.00	1½%
	50.00 to 74.00	2%
	75.00 and over	3%
Quantity:	$ 1.00 to $499.00	None
	500.00 and over	1%

Allowances	
Advertising	1%
Promotion	1%

This is the same volume discount schedule that Dr. Edwards reports National put into effect on January 1, 1954. (p. 258)

PROCEEDINGS AGAINST SUNSHINE

On March 11, 1954, the Commission issued a complaint against Sunshine, Docket No. 6191, charging a violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by discriminating in price among grocery store customers through the use of volume discounts in the sale of bakery packaged products, including cookies and crackers. The initial decision of the Hearing Examiner was adopted by the Commission on July 30, 1955, and is reported at 52 F.T.C. 110. That proceeding, too, was disposed of by a stipulation which provided for a consent order. The Commission's order directed Sunshine to cease and desist, in the sale of bakery packaged food products, "from discriminating in price, directly or in-

directly, between said purchasers of said products by selling such products of like grade and quality to any purchaser at a price different from that granted any other purchaser who in fact competes with the former in the sale or redistribution of such products."

The Commission publicly stated in 1963 that in *Sunshine*, "no report of compliance had been received and filed as showing compliance." (*Ibid.*) We are advised that as of the present no report of compliance has been received and filed showing compliance.

The Commission further publicly stated in 1963, "in other words, the reports in both matters [*National* and *Sunshine*], aside from the report received prior to modification in *National Biscuit*, have not been formally acted upon by the Commission and are still pending before it for consideration." (*Ibid.*)

SUNSHINE'S PRESENT DISCOUNTS

Sunshine's written price list, dated June 9, 1964, publicly and openly disseminated to the trade, states the availability of the following discounts totaling 6% based upon monthly purchases (plus the 1% cash discount):

Store Discount	
$15 to $29.99 Individual Store Volume	2% store discount
$30 and over Individual Store Volume (Store purchases will be averaged quarterly.)	3% store discount

Quantity Discount	
$500 and over monthly	1% quantity discount

Advertising & Sales Promotion	
When earned	2%

PROCEEDINGS AGAINST UNITED

The Commission issued its complaint against United on March 10, 1960. Its cease and desist order issued February 7, 1964, was affirmed by the Court of Appeals for the Seventh Circuit August 11, 1965, and that Court thereupon issued its order in the same language as the order of the Commission. On October 25, 1965, the Supreme Court extended the time for United to file a petition for certiorari to December 13, 1965. A petition for certiorari will be filed within that time.

Like the *National* and *Sunshine* cases, the United complaint attacks volume discounts as violations of Section 2(a) of the Robinson-Patman Amendment to the Clayton Act, and the order—directed to second line competition—is substantially in the language of the statute.

UNITED'S PRESENT DISCOUNTS

As the Commission's opinion in this case states, United's volume discounts to purchasers at the time the complaint issued ranged up to 6%. United's discount schedule currently in effect, issued March 4, 1965, is as follows (exclusive of the 1% cash discount):

Monthly Purchase	*Discount*
Store Discount	
$ .00 to $ 19.99	0%
20.00 to 34.99	2%
35.00 to 49.99	2½%
50.00 to 74.99	3%
75.00 to 500.00	4%
Quantity Discount	
$ .00 to $499.99	0%
500.00 and over	1%
Advertising Allowance	1%

VOLUME DISCOUNT EFFECT ON COMPETITION

Each of the three companies gives its customers in effect discounts going up to 6% (and a 1% cash discount) on accumulated monthly purchases. It is National, however, the dominant company in the industry, which derives the principal economic benefit from them.

Just this month the Commission said of quantity discounts:

> The Commission has noted in the past and we now hold that quantity discounts have an inherent "tying" effect in that they encourage a purchaser to confine his purchases to a single seller or a small number of sellers so that he will obtain the maximum discount, and that this is one of the principal purposes of such discounts. (Opinion, p. 31, *Dean Milk Company*, Dkt. No. 8032, released November 5, 1965.)

Monthly graduated volume discounts necessarily give the greatest advantage to the seller which has the largest sales volume; and it follows that the further advantage of the "tying" effect is enjoyed to the greatest extent by the dominant seller, which has the most complete line of products and the most highly advertised brand name, and not by a seller which is a poor third in the industry and whose sales have been declining. A seller having lower sales volume and lacking the same "tying" effect obviously reaches fewer customers in the higher bracket and maximum discount range (or in other words the same net price) as the dominant seller although the same list prices and discounts are used. Volume discounts, therefore, do not provide for and in fact deter competition on an item-by-item basis.

National is United's prime competitor. As the dominant seller in the industry, it has inherent competitive advantages over United. This is shown by the fact that National's 1964 profits were 6% of its sales, while United's were but

1%. National sells its products in every area and community where United sells, and it outsells United in almost every one of these markets. This is *not* a case where the difference in sales volume between the larger and the smaller company is due to the fact that the smaller company simply markets in a small geographic area in which it enjoys a sales volume equal to its large rival.

United receives no competitive advantage from its volume discount practices in regard to its two largest competitors. It merely reduces its competitive disadvantage. But United's competitive disadvantage will be catastrophic if it is required to discontinue giving monthly graduated volume discounts while its competitors, particularly the dominant seller, continue to grant them.

The 1% "quantity" discount which all three sellers give on sales of $500 and over is measured, by each, by the combined purchases of chain buyers, or voluntary groups. This sum is paid directly to headquarters. Thus again United will be at a great competitive disadvantage if its dominant competitors continue to pay, but it must give up paying, 1% of total combined purchases to the headquarters of each chain buyer and voluntary group. These payments are now no advantage to any seller, since all give the same proportionate payment, but for United to be compelled to give up the practice while its larger competitors continue the practice would give those competitors a further and overwhelming competitive advantage in numerically large and most important customer groups representing three quarters of United's sales.

The balance of National's discount, a 1% monthly advertising allowance paid for merely running two ads a month and 1% monthly promotional allowance paid on an automatic basis unless the salesman sends in a report that the customer did not promote National's product that month, are also computed on the basis of the monthly

volume of purchases and, therefore, again give the dominant seller the advantage.

Thus, even with both companies giving discounts, National has a decided competitive advantage; but it would cripple United's ability to compete if National had both the advantage inherent in being the dominant seller giving a volume discount and the additional advantage of its smaller competitor not being able to give a similar discount. This would be too much for United to be able to compete. To put these discounts in perspective, we point out that United's discount payments over the year are several times its total annual net profit. Were United now to be required to abandon its volume discounts while National and Sunshine were permitted to continue theirs, the only alternative for United would be to give a flat across-the-board reduction in price equivalent to the competitor's maximum discount to every one of its customers. The additional annual amount which would have to be paid out over the cost of United's present graduated volume discount would exceed the total net profit which United earned in 1964. United thus would incur heavy loss of revenue with no possibility that that loss would be in any manner offset by increased sales, since in effect the maximum graduated discount would be paid to all customers whether or not they had the capacity or potentiality to increase their purchases. Obviously, United could not continue in business under such conditions.

Further, we deem it important to note that if United were required to abandon its volume discounts, that action would not encourage National or Sunshine to follow suit. On the contrary, those companies would have every incentive to retain their discounts as long as possible in order to exploit their overpowering competitive advantage against United.

UNITED'S POSITION ON ELIMINATION OF VOLUME DISCOUNTS IN THE INDUSTRY

In the light of the industry structure, the economic effects of volume discounts, and the action already taken by the Commision, United assumes that the Commission's ultimate goal is to eliminate the use of such discounts in the industry.

For its part, United does not disagree with that objective on an industry-wide basis. *United is willing to discontinue all volume discounts as soon as it can competitively do so.* In the event that the existing order against it becomes final, United will file a report of compliance with the Commission stating that United will give up all volume discounts as soon as National and Sunshine do so; for, as pointed out above, while United enjoys no advantage from such discounts, it nevertheless cannot survive the competitive disadvantage of not granting such discounts as long as its major competitors, National and Sunshine, continue to grant them.

EFFECT OF UNCERTAINTY CONCERNING NATIONAL's AND SUNSHINE'S DISCOUNTS

United has been deprived of a clear-cut prior determination of validity or invalidity of the discounts of the two leading companies in the industry, National and Sunshine. The uncertainty concerning the Commission's present and future position on the discounts of those companies has impaired the use of and continues to present a formidable problem in regard to the applicability of the statutory defenses of cost justification and meeting competition. United has always had to face the fact that there was the possibility that National's and Sunshine's present volume discounts, or some altered version of them, might be held to be lawful on some basis and permitted under the orders outstanding against these companies.

One key to the legality of National's and Sunshine's discounts would be the determination of whether the discounts could be cost justified. United's sales, distribution and delivery system is comparable to that of National and Sunshine. Given the basis on which National or Sunshine has or can cost justify its volume discounts to the satisfaction of the Commission, United believes it can similarly cost justify like discounts. But United does not know whether National or Sunshine has submitted cost studies to the Commission, or if they have what views the Commission holds as to the propriety of those studies as cost justifying these discounts.

Similarly, although the Supreme Court's opinion in *Ruberoid* makes clear that the Section 2(b) defense of the Clayton Act is written into the order issued in this case and that United, therefore, has the right in good faith to meet the equally low net prices of National and Sunshine, including all discounts and allowances making up net price, we are not unmindful of the Commission's decisions that (a) meeting the equally low price of a competitor must be done in individual competitive situations and (b) the seller may not meet a lower price which he knows, or has reason to believe, is unlawful.

United's products sit side by side on the grocer's shelves with National's products; and, as noted above, United cannot effectively compete with this dominant competitor, National, on less favorable terms than National offers to the customer. In actual practice, monthly volume discounts can be competitively dealt with only by similarly granting monthly volume discounts and not by attempting to meet the resulting net prices for each item purchased by each customer which will be determined by the operation of the competitor's graduated volume discount at some later date. United has well over 100,000 customers. Thus the problems of getting out a new price schedule are substantial: a major undertaking is required simply to

brief United's sales force of well over 1,000 salesmen on a new price schedule. United, therefore, cannot competitively revise its price schedules for each product for individual customers on a day-to-day basis; it must know the prices under which it can do business. Nor is it feasible to have detailed reports on National's and Sunshine's sales volume with each United customer to determine their net prices. Virtually no customer will supply that information. They will simply discontinue buying from United if United's prices are higher.

The existence of orders against National and Sunshine, which have been in effect for more than ten years without any indication from the Commission that it considers the prices of those companies to violate these orders, could conceivably lead a reasonable and prudent businessman to believe that the Commission does not find the net prices of either National or Sunshine unlawful. On the other hand, the fact that the reports of compliance of both National and Sunshine have not been acted upon in the long intervening period raises serious doubts.

UNITED'S IMPOSSIBLE LEGAL SITUATION

The order against United puts the company in a precarious legal position. The Commission's orders against National and Sunshine were issued prior to the enactment of the Finality Act of July 23, 1959, so the Commission's only remedy for a violation of those orders is an application to a court of appeals for enforcement. In pressing for enactment of the finality statute, the Commission told Congress that the prior procedure gave a respondent "three bites at the cherry." But it appears that National has been "nibbling" at the cherry for twenty years. As long as the Compliance Division continues to study National's various reports of compliance, National (and Sunshine) are subject to no penalties whatever for their volume discount schedules even though there are patent violations of

both the statute and the order. Since 1959 those companies have been in a decidedly better position than if the Commission had never issued a complaint against them.

Unfortunately for United, and its ability to be competitive in this industry, it was not sued until long after its two larger competitors and the order against it was issued after the enactment of the Finality Act. Thus violations of the order by United, if and when it becomes final, will make it subject to civil penalties of up to $5,000 for each violation.

While United clearly has the right to meet National's (and Sunshine's) lower net prices, the Commission apparently would deny it that right if United has reason to believe that those prices are unlawful. Yet United needs the reports of compliance of those companies, which have expressly been denied to it, to know what are in fact the net prices of those competitors and to consider the propriety of those prices. And United should know whether the Commission views those prices as lawful—a determination the Commission has not made although it has been studying the issue for at least eleven years (seventeen years according to Dr. Edwards).

In its order of April 10, 1964 in this case, the Commission said that, "respondent [United], with the issuance of the price discrimination order against it, is now more nearly on a par with its major competitors [National and Sunshine] who have been operating under prohibitions of this nature for some time." Unless the Commission meant by that statement to hold that National and Sunshine were in fact then in compliance with the existing orders against them, the statement is unfair. For, as we have shown above, those competitors may, if they choose, ignore the existing orders against them with impunity, while United is subject to the drastic penalties of the 1959 Act.

United cannot, in the interest of its own competitive survival, sit by passively while its major competitors continue with impunity to grant discounts up to 6%, while it is compelled to discontinue doing so. United's very survival compels it to pursue every means to avoid this inequity.

THE RELIEF SOUGHT

United is willing to abandon all volume discounts as soon as its dominant competitors competively permit it to do so. Therefore, United respectfully asks the Commission to modify the order against United in Docket No. 7817, if it should become final, to postpone the effective date thereof until sixty (60) days after such time as National and Sunshine are found by the Commission to be in compliance with the orders heretofore issued against them, and United has been so advised. This may result from either (a) the Commission finding that their present volume discount schedules are not prohibited by the respective orders against them, or (b) each of them voluntarily adopts a price schedule which does comply with the orders, or (c) a court of appeals either finds no violation of the respective orders or orders enforcement thereof.

We have shown above that its volume discount schedule is of no advantage to United, since its use merely reduces the competitive disadvantage under which United competes with the dominant seller in the industry when it, too, gives such discounts. *Thus, if this request for a stay of the order is granted, United will withdraw its petition for certiorari.*

The Commission will lose nothing by granting this request. To force United alone to give up volume discounts will not only impair competition in the industry, but will encourage National and Sunshine to retain their volume discount schedule as long as possible to pirate as much of United's business as it is possible for them to capture on that basis.

THE QUICK SOLUTION

This is an industry problem. For over twenty years, volume discounts have permeated this industry. What is needed now is an early determination by the Commission of whether or not such volume discounts are permissible in this industry, and, if they are, what form and magnitude of volume discounts are permissible. For a prompt solution to the issue, and, we believe, the achievement of competition in this industry based on the competitive factors applicable to each individual item in the line, an industry conference of the three largest sellers is called for. If the three largest sellers abandon volume discounts they will promptly disappear from the industry. Indeed, if National alone gives up volume discounts, such discounts will disappear from the industry.

The Commission's argument to the Court of Appeals in the *United* case, and the Court's decision in that case, are to the effect that in this industry these volume discounts are *per se* illegal (unless cost justified). See also *Dean Milk Company, supra.* National and Sunshine might be told, we suggest, that the Commission means business and that the twenty years of study are over. United would hope this would mean an end to volume discounts in this industry; United's response to such a course of action is stated above.

PRECEDENTS

The Commission has exercised its discretionary authority to assure equality of relief against two or more competitors in a single industry. See the *Carpet Cases,* Dockets 7420, 7421, 7631, 7632, 7633, 7636, 7637, and 7638; the *Shaver Cases,* Dockets 6892, 6701, and 6900; *Chesebrough-Ponds, Inc.,* Docket 8491; *Union Carbide Corporation,* Docket 8492; *Atlantic Products Corporation,* Docket 8513; *Schulze and Burch Biscuit Company,* Docket 7452; and the *Garment Cases,* see F.T.C. Press Release of August 12, 1965. *Cf.*

Universal-Rundle v. *Federal Trade Commission*, CA 7, Number 14,763, Opinion October 22, 1965.

CONCLUSION

United respectfully requests that the effective date of the foregoing order against it be stayed until there is compliance by National and Sunshine with the orders heretofore issued against them. Seven copies of this application are filed with the Secretary, with the request that he forward a copy to each Commissioner. We respectfully request an informal conference with the Commission on this application at its early convenience. We are also transmitting copies of this application to Joseph E. Sheehy, Esquire, Director, Bureau of Restraint of Trade, and James B. Truly, Esquire, Assistant General Counsel for Appellate Matters, with the hope that we may discuss this matter with them informally, in advance of meeting with the Commission, so that the Commission may have the benefit of their views.

Respectfully submitted,

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JOHN F. DAVIS, CLERK

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 888

UNITED BISCUIT COMPANY OF AMERICA, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR REHEARING

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March 24, 1966

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 888

UNITED BISCUIT COMPANY OF AMERICA, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR REHEARING

Pursuant to Rule 58 of this Court's Rules, petitioner asks Rehearing of this Court's order of February 28, 1966, denying its petition for certiorari, limited to petitioner's third point: that the refusal of the Commission to grant a temporary stay of enforcement of its order against United was, under the special circumstances of this case, a patent abuse of discretion which should have been corrected by the Court of Appeals.

The Court of Appeals decision here was entered August 9, 1965. On October 22, 1965, another panel of the same Court of Appeals issued its decision in *Universal-Rundle Corporation* v. *Federal Trade Commission,*

352 F.2d 831 (C.A. 7). As the Commission said in its petition for rehearing to the Court of Appeals in the *Universal-Rundle* case, on the question of a stay of the Commission's order, "The decision conflicts with the decision of another panel of the Court in *United Biscuit Company of America* v. *Federal Trade Commission,* 350 F.2d 615." The Court of Appeals denied rehearing December 17, 1965.

In the Commission's brief in opposition to petitioner's petition for certiorari here the Solicitor General, as to petitioner's point that the decision in this case is in conflict with that of another panel of the same Court in *Universal-Rundle,* said: "Whether or not *Universal-Rundle* was correctly decided, we note that in the present case cease and desist orders have already been entered against United's principal competitors . . ." (pp. 11-12). The orders against United's competitors were, however, subsequently held unenforceable by the Court of Appeals for the Ninth Circuit, on February 16, 1966, in *Federal Trade Commission* v. *Jantzen, Inc.* (see Solicitor General's Supplemental Memorandum here).[1] Thus, on this point, there is now no distinction between this case and *Universal-Rundle.*

The Solicitor General's brief in opposition here stated in a footnote (p. 11): "The Solicitor General has not yet determined whether to file a petition for certiorari in that [*Universal-Rundle*] case." On March 18, 1966, counsel for petitioner here wrote the Solicitor General asking if he intended to file a petition for

[1] The Solicitor General's Supplemental Memorandum avoids stating whether *Jantzen* was correctly decided; the time to petition for certiorari has not yet expired.

certiorari in *Universal-Rundle,* and on the same date the Solicitor General advised petitioner's counsel that, "I have determined to file a petition for a writ of certiorari in the *Universal-Rundle* case" (see Appendix).

Petitioner asks for a rehearing in this case, on its third point, so that if the Court grants certiorari in the *Universal-Rundle* case, it will have jurisdiction to hear both cases, to resolve the conflict in decisions and to administer equal justice.

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Certification of Counsel

William Simon, counsel for petitioner, does hereby certify that the foregoing petition for rehearing was filed in good faith and not for delay and does further certify that the petition for rehearing is restricted to the grounds specified therein.

WILLIAM SIMON

March 24, 1966

APPENDIX

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C. 20530

March 18, 1966

William Simon, Esq.
Howrey, Simon, Baker &
Murchison
1707 H Street, N.W.
Washington, D. C. 20006

Dear Mr. Simon:

In response to the inquiry in your letter of March 18, 1966, I have determined to file a petition for a writ of certiorari in the *Universal-Rundle* case.

Sincerely,

THURGOOD MARSHALL
Thurgood Marshall
Solicitor General